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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1094

OHIO INNS, INC.,

Petitioner,

v.

WILLIAM B. NYE, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Petitioner Ohio Inns, Inc. respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on October 6, 1976.

OPINIONS BELOW

The opinions of both the Court of Appeals and the District Court are reported at 542 F.2d 673. The opinion of the District Court was not reported until the decision of the Court of Appeals, which adopted the District Court's opinion and published it as an appendix to the Court of Appeals' opinion. Both opinions are reproduced in Appendix A, *infra*.

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

The judgment of the Court of Appeals for the Sixth Circuit was entered on October 6, 1976. Time to petition for rehearing was extended until October 22, 1976. The petition for rehearing was filed October 21, 1976 and denied by a court order entered on November 10, 1976. This petition for certiorari is filed within 90 days of that date.

QUESTIONS PRESENTED

1. Does a contractor with a state agency for the operation of public service facilities have a property interest in his contract with the right to protection of that interest by the Due Process Clause and 42 U.S.C. §§ 1983 and 1985(3) against the wrongful invasion thereof by state officials under color of state law, where the contract grants the contractor the exclusive right to occupancy of the facilities for a term of years, subject to earlier termination only for specified acts of default?

2. Did the Governor and the Director of Natural Resources of Ohio deprive the contractor of its property without due process of law under the teachings of *Sterling* v. *Constantin*, 287 U.S. 378 (1932), where, on the pretext of public safety but in reality to further their partisan political objectives, they conspired to commit acts under color of state law to bring about the termination of such contract, or the indefinite suspension of the contractor's right of occupancy thereunder, and where they did commit such acts, including the promulgation and enforcement, without notice or hearing, of an executive order evicting the contractor from the premises occupied by it under its contract, in direct violation and disregard of an order of a court of competent jurisdiction and of the provisions of the contract?

3. Did not the dismissal by the District Court on motion for failure to state a claim, before the reception of any

evidence, conflict directly with this Court's decision in *Scheuer* v. *Rhodes*, 416 U.S. 232 (1974), where the complaint specifically places in issue the good faith of the executive officials involved by charging that their actions were not taken in the public interest or supported by any consideration of the public interest but rather were motivated by their partisan political objectives and malice?

4. Did not the District Court's dismissal of Petitioner's action for substantial damages under 42 U.S.C. §§ 1983 and 1985(3) on the ground that the complaint fails to state a claim upon which relief may be granted and the Court of Appeals' summary affirmance of that judgment on the ground that the action is "basically" a suit for breach of contract and defamation within the "exclusive" jurisdiction of the state courts directly conflict with this Court's decision in *Monroe* v. *Pape*, 365 U.S. 167 (1961)?

5. Did not the Court of Appeals' summary disposition of Petitioner's appeal, under Sixth Circuit Rules dispensing with briefs and argument, on the ground that the questions upon which this appeal turns were so unsubstantial as not to require further argument, so far depart from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision to remand the case to the Court of Appeals for a full consideration of these questions on their merits?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following Constitutional and statutory provisions are set out in Appendix B, at pages ...-...: 42 U.S.C. §§ 1983 and 1985(3); Ohio Revised Code §§ 1501.09 and 1501.091; United States Constitution, Amendment XIV, § 1.

STATEMENT OF THE CASE

1. Petitioner's Concession Contracts

Ohio Revised Code §§ 1501.09 and 1501.091 [1] authorize the Director of Natural Resources, a cabinet-level executive officer of the state government, to enter into contracts with private persons for the operation and management of lodging, food service, and recreational facilities in Ohio's state parks. It simply provides that contracts be awarded on the basis of competitive bidding and that they include "such . . . provisions as the director deems necessary to satisfy the needs of the people of the state for public park facilities." Ohio Rev. Code § 1501.091. The length of term, the termination provisions of the contracts, and the details governing performance and default under these contracts are left entirely to the discretion of the Director.

In 1966 a public service facilities contract covering Burr Oak State Park in Morgan County, Ohio and two other state parks was awarded to Petitioner pursuant to these statutes. In 1970 another was awarded to Petitioner covering Salt Fork State Park in Guernsey County, Ohio.[2] These contracts granted to Petitioner for a term of ten years in the performance of its duties an exclusive right of occupancy of certain "properties", consisting of lodging, restaurant and recreation facilities in each of the four parks, for the purpose of providing "highly competent and economic practical management, maintenance, and operation of the said public service facilities . . . ." In return, Petitioner undertook to make monthly "remittances" to the Department of Natural Resources, computed by apply-

[1] Appendix B, *infra*.

[2] Complete copies of both contracts are attached to the Amended Complaint filed in the District Court. Pertinent excerpts from the 1966 Burr Oak contract are included in Appendix C to this petition at pp. 30a-37a. The corresponding provisions of the 1970 contract are substantially identical.

ing varying percentagaes to Petitioner's gross receipts for cabin rentals, guest and meeting-room accommodations, food and beverage sales, and other itemized sources of operating revenue.[3]

The pertinent provisions of these contracts respecting Petitioner's right of occupancy of the "properties" are contained in paragraphs (4), (14), and (21). Paragraph (4) recites the intent of the parties that the facilities be operated on a year-round basis, and requires that they be open for public use and occupancy "at all times" unless, upon application of the concessionaire, the Director approves a shutdown in "off seasons". Paragraph (14) is a general grant to the concessionaire of "control and discretion" in the operation of its business, "including . . . the labor policies [and] wage rates) and the hiring and discharge of employees . . . all except as otherwise herein expressly limited or provided". In connection with this general grant of authority the Department covenants that

> Concessionaire, making the payments specified herein and performing and observing the agreements and

[3] The practice of the Department in inviting bids under Ohio Rev. Code § 1501.091 has been to submit to prospective concessionaires a form of contract complete in virtually all details in advance of the invitation, and to solicit only a proposal (1) describing the amount and method by which the contractor proposed to compensate the Department, and (2) in at least one instance, describing the "promotional activities" which the bidder would finance to stimulate patronage by the public. Thus, compensation to the Department has traditionally been the principal "competitive" consideration in both bidding on and awarding the contracts. Revenues from public service facilities are committed by law either to a "state park rotary fund" devoted exclusively to state park purposes or to the retirement of any bonded indebtedness incurred by the Department in the acquisition of state park lands and public service facilities. Ohio Rev. Code §§ 1501.11-1501.14, 1541.22. The validity of the private contracting scheme authorized by §§ 1501.09 and 1501.091 has been upheld against attacks on various state constitutional grounds by the Franklin County (Ohio) Court of Appeals in an unreported decision, *State ex rel. Trumble* v. *Morr*, No. 72AP-16, Franklin County, Ohio, Court of Appeals (1972).

conditions herein on its part to be performed and observed, *may occupy the properties during the term hereof without further demands or hindrance by the Department or anyone claiming under it.* (p. 33a) (emphasis added).

Finally, paragraph (21) sets forth eight conditions of default. In the event of any default the Department may declare the contract terminated and the concessionaire "shall immediately turn over all the properties to the Department the same as if the term of the contract had expired." Among these conditions [4] are (1) failure to cure any defect relating to food or food service within 10 days following written notice from the Department "designating such default", and (2) failure to "commence diligently to correct" any other defect under the terms of the contract within thirty days after such notice.

The contracts do not condition the Department's right of termination on any procedure other than the default notices; nor do they expressly provide for any hearing or adversary proceeding of any kind in the event the concessionaire wishes to contest any charge of default as unfounded; nor do they provide any means (such as arbitration) of resolving disputes not involving termination. It is clear, however, that the contracts grant Petitioner the exclusive occupancy of the properties for a term of years, during which its rights under the contracts, including its right to unmolested access to and occupancy of the "properties", are terminable only for cause.

[4] Subparagraph (a) authorizes termination for failure to make any payment due within fifteen days after written notice from the Department "designating such default"; Subparagraph (d) authorizes immediate termination in the event the concessionaire abandons the properties or discontinues business operations; the remaining subparagraphs refer to events or conditions of insolvency. In the event of "repeated" default involving improper food or service "sufficient to cause a decline in public respect" the Department reserves the right to terminate by written notice "even though the immediate default may have been corrected."

2. Events Underlying This Lawsuit

This lawsuit centers about a closing of the facilities at Burr Oak State Park in Morgan County, Ohio from August 4 to October 22, 1973, during the height of the 1973 summer vacation season when use of the facilities was at a peak. The closing was effected by means of an executive order of the Governor, Respondent Gilligan, which recited his investigation of a "labor-management dispute" and his determination that a "danger to the public and to state property" existed as a result of it. Petitioner has maintained and has at all times stood ready to prove that the emergency declaration was a sham, part of a scheme to bring about the termination of Petitioner's contracts unless Petitioner's employees were delivered to a labor union.

The events which are the subject matter of the litigation began in the spring of 1973, seven years after Petitioner had begun performance under its 1966 contract and six years after it had taken possession of the facilities at Burr Oak State Park. In early 1973, a labor dispute arose between Petitioner and Local Nos. 505 and 651 of the Hotel, Motel, Restaurant Employees and Bartenders Union, AFL-CIO. In March, 1973 Local 505 demanded that Petitioner recognize it as the exclusive bargaining representative for certain employees at the Burr Oak State Park Lodge in Morgan County, Ohio, while Local 651 had for several months sought to organize Petitioner's employees at Salt Fork State Park in Guernsey County. The Burr Oak labor dispute was placed before the National Labor Relations Board by a petition on behalf of Local 505 for an election among the employees at Burr Oak. The issue was whether the Board would assert jurisdiction under Federal

labor law over Petitioner and its employees and conduct a representation election by secret ballot.

Without waiting for the decision by the Board,[5] the local union called a strike among some, but by no means all, of the employees of Petitioner at Burr Oak State Park on May 4, 1973 in an effort to force Petitioner to recognize its right to bargain for Petitioner's employees—the very issue it had placed before the NLRB. The strike was accompanied by a picket line, acts of violence, property destruction, intimidation, and the physical injury of several individuals attempting to enter or leave the park. The purpose was to close down the park facilities operated by Petitioner. On May 4 and May 15, respectively, the Common Pleas Court of Morgan County, Ohio issued a temporary restraining order and a preliminary injunction against Local 505 and certain of its officers and representatives restricting the number of pickets and restraining acts of violence, property destruction, intimidation and threats of bodily harm in connection with strike activities.

On May 30, 1973, the Director of Natural Resources (Respondent Nye) began to charge Petitioner with various alleged shortcomings in its performance of the 1970 contract covering the operation of the lodge at Salt Fork State Park in Guernsey County. For the first time the Director charged Petitioner with alleged defaults in the performance of that contract going back into 1972. On June 4, 1973 he also demanded that Petitioner recognize and bargain with the local union at Burr Oak (despite the overriding question of whether Petitioner was obligated to do so under federal law), or face termination of its contract covering Burr Oak. The Director publicly stated on several occasions

[5] The Board rendered its decision on August 13, 1973. It declined to exercise jurisdiction over Petitioner's Burr Oak employees because it found that Petitioner was a "joint employer" with the Department of Natural Resources. *Ohio Inns, Inc.*, 205 NLRB 528, 84 LRRM 1005 (1973).

that Petitioner's operation of the facilities at these four state parks with non-union employees was a political embarrassment to him and to the Governor (Respondent Gilligan) and that he was under great pressure from labor unions to require Petitioner to recognize the local union in dealing with its employees.

These charges of default and threats of termination continued throughout the month of June, 1973, culminating in formal threats of termination of both contracts for alleged defaults in performance. These included the charge that the failure or refusal of Petitioner to recognize and bargain with the local unions at Salt Fork and Burr Oak was a violation of Paragraph 25 of the contracts, obligating Petitioner in general terms to "observe and comply with . . . existing and future laws, ordinances, regulations, orders and decrees . . . ."

In the face of these threats of termination Petitioner on July 10, 1973 filed a complaint in the Guernsey County Court of Common Pleas seeking declaratory relief respecting the right of the Department to terminate the two contracts. With notice to the Department Petitioner also sought a temporary restraining order and a preliminary injunction, enjoining defendants from taking any action to terminate, on any pretext, either of the contracts, and from acting separately or in combination with any other person for the purpose of interfering with or harassing Petitioner in the performance of its contracts. The Common Pleas Court reviewed evidence and listened to arguments on Petitioner's motion for a temporary restraining order on July 11, 1973 and on Petitioner's motion for a preliminary injunction on July 19, 1973. A temporary restraining order was issued on July 11 and a preliminary injunction was issued on July 23. These orders enjoined Respondent Nye and the Department from taking any action to terminate Petitioner's contracts, from acting separately or in

combination with others to interfere with or harass Petitioner in the management and operation of the facilities covered by its contracts, and from actively soliciting persons not to patronize the facilities operated by Petitioner.[6]

Ten days later, on August 3, 1973, despite the injunction and with notice of it, Respondent Gilligan, at the behest of Respondent Nye, issued his "Executive Order" authorizing and directing Respondent Nye and the Department to adopt certain "Emergency Rules" ordering the lodge and cabin facilities at Burr Oak State Park closed and vacated.[7] The next day, August 4, 1973, officials of the Department appeared at Burr Oak pursuant to the "Rules" and ordered all patrons, guests, and other persons to leave the facilities there under threat of arrest. Petitioner's employees and all patrons promptly left the premises in various states of disarray and were not permitted to return for nearly three months.

On August 8, 1973 Petitioner filed a verified charge of contempt against respondents Gilligan and Nye and certain subordinates in the Guernsey County Common Pleas Court for violation of that court's order enjoining Nye and those acting in concert with him from interfering with Petitioner's operation of the facilities. An evidentiary hearing

[6] The Guernsey County Common Pleas preliminary injunction of July 23, 1973 is reproduced in Appendix D, *infra*.

[7] The Executive Order and Rules are set forth in Appendix E, *infra*. The procedure which the Respondents purported to invoke is that provided by Ohio Rev. Code § 119.03(F), part of the state's general Administrative Procedure Act which authorizes the governor to dispense with the notice and hearing otherwise required for the adoption, amendment, or rescission of rules by state agencies if, upon request of an agency, he determines an emergency to exist requiring immediate adoption. Rules so promulgated are effective only for sixty days. "Rule" is defined by Ohio Rev. Code § 119.01 as "any rule, regulation, or standard, having a *general and uniform operation*, adopted, promulgated and enforced by any agency *under the authority of the laws governing such agency* . . ." (emphasis added).

was held on the charge on August 9, 1973. The hearing lasted throughout the afternoon and the matter was submitted to Judge Merle Hoddinott of the Monroe County Common Pleas Court, sitting by designation. Judge Hoddinott had presided over Petitioner's injunction suit from the outset and had taken evidence and heard argument in the two previous hearings in July on Petitioner's motions for provisional injunctive relief. On August 13, 1973, Judge Hoddinott telephoned counsel announcing that he had determined that Respondents were in contempt of the Common Pleas Court injunction and that he was scheduling a hearing for August 15, 1973 for entry of the contempt order. A copy of the Judge's proposed journal entry, which was signed but never filed or journalized, is set forth in Appendix F.

On August 14, 1973, before the scheduled hearing in the Common Pleas Court could take place and without notice to counsel for Petitioner, counsel for Respondents Nye and Gilligan appeared *ex parte* before Chief Justice William O'Neill of the Ohio Supreme Court and procured an alternative writ of prohibition directed to Judge Hoddinott and ordering him to refrain from conducting any further proceedings on the charge of contempt. Petitioner moved to intervene in this original action in the Ohio Supreme Court. Leave to intervene was denied and Petitioner was not permitted to participate in the composition of the record on which that proceeding was conducted.[8]

On December 5, 1973 the Ohio Supreme Court rendered a decision in the prohibition action allowing a final writ.

[8] The entry denying petitioner's motion to intervene gave no reasons for that action and cited no authorities. But c.f. *State ex rel. Cleveland Trust Company* v. *Probate Court*, 82 Ohio L. Abs. 291 (Cuyahoga County App. 1959). Petitioner was given leave to file an amicus brief in support of the Common Pleas Court's jurisdiction.

The writ directed Judge Hoddinott to cease holding any further contempt proceedings as well as any other action in petitioner's injunction suit.[9]

3. The Amended Complaint and Proceedings Below

Petitioner filed its Complaint in the District Court on January 10, 1975 seeking recovery of its substantial losses from Respondents Nye and Gilligan and the Department of Natural Resources. The Amended Complaint [10] contained three counts. In the first count Petitioner set forth substantially the facts hereinabove recited and sought damages against Respondents under 42 U.S.C. §§ 1983 and 1985 (3).[11] The jurisdiction of the District Court was invoked under 28 U.S.C. §§ 1343 and 1331. By the second and third counts Petitioner sought recovery against Respondents Nye and Gilligan individually for interference with Petitioner's contracts, against the Department for breach of contract, and against Nye individually for defamation.

The theory of the civil rights count of the Amended Complaint is that the Governor's Executive Order and the Department's Rules promulgated thereunder were not based on any genuine public emergency, that the recitals in the Executive Order to that effect were pretextual, and that the Order and Rules were in reality a device to circumvent the court order enjoining Respondent Nye and others from interfering with Petitioner's operation and management of park facilities pursuant to its contracts.

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[9] *State ex rel Gilligan* v. *Hoddinott*, 36 Ohio St. 2d 127, 304 N.E. 2d 882 (1973). The decision was rendered on a two-page stipulation of facts between counsel for Respondents and for Judge Hoddinott, without oral argument and without benefit of the record of proceedings on Petitioner's motions for temporary restraining order and preliminary injunction.

[10] Petitioner filed an Amended Complaint as of right under Rule 15(A), F.R.Civ.P. on January 31, 1975.

[11] *Infra*, pp. 16a-23a.

The Amended Complaint specifically alleges that Respondent Nye knew that no public emergency existed at the time he procured the Governor's Order and that whatever conditions of civil disturbance may have existed were the result of his own deliberate refusal to supply adequate law enforcement and, moreover, were conditions that he affirmatively and intentionally fostered in order to accomplish indirectly what the common pleas court injunction prohibited him from accomplishing directly. With respect to Respondent Gilligan, the Amended Complaint charges that he knew or should have known of Respondent Nye's purpose in procuring the Order, that he knew or should have known that there was no threat to public safety or state property not susceptible to control by established law enforcement authorities, and that he had notice of the injunction.

All defendants moved to dismiss the Complaint pursuant to Rule 12(b), F.R.Civ.P., the Department raising the defense of sovereign immunity and the individual defendants asserting that the Amended Complaint failed to allege the violation of any federal right. These motions were briefed and submitted without oral argument in June, 1975. On January 7, 1976, the District Court granted the motions and dismissed the action without leave to amend. Petitioner's motion to alter or amend the judgment was denied on February 5, 1976.

Petitioner filed a notice of appeal on March 4, 1976 and a brief on the merits in the Court of Appeals on July 6, 1976. On July 15, 1976 the Court of Appeals, on its own motion and without advance notice to counsel, entered an order dismissing the appeal on the ground that the notice of appeal was filed out of time. Petitioner petitioned the Court of Appeals to reconsider its order of dismissal, pointing out that the order of July 15, 1976 was based on a

misreading of Rule 59(e), F.R.Civ.P.[12] On October 6, 1976 the Court of Appeals entered the order whose rehearing was later denied and which is the subject of this petition.[13] The *per curiam* decision vacated the order of dismissal, reinstated the appeal, but then invoked Sixth Circuit Rules 3(e) and 8[14] to affirm summarily the judgment of the District Court on the merits.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

1. The Sixth Circuit's Decision Conflicts with the Decisions of This Court by Refusing to Recognize a Protected Property Interest Under the Due Process Clause.

The lower courts' truncated view and conclusory characterization of Petitioner's complaint in this action as "basically" a suit for breach of contract or interference with contract under state law ignores an entire line of decisions of this Court refining the concept of "property" entitled to the procedural guarantees of the Due Process Clause.

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[12] The court had noted that Petitioner had "filed" its motion for reconsideration more than ten days after the entry of the District Court's judgment and therefore did not toll the running of time for appeal. Rule 59(e) requires only that a motion to alter or amend the judgment be *served* (not filed) within ten days of the entry of the judgment in order to suspend the running of the time for the filing of a notice of appeal.

[13] On October 4, 1976, Petitioner filed in this Court a motion for an extension of time to file a petition for certiorari from the Court of Appeals' order of dismissal of July 15, 1976, which motion was granted by Mr. Justice Stewart.

[14] Rule 3(e) is reproduced in the Court of Appeals opinion, *infra* at 2a, n.1. Sixth Circuit Rule 8(b) is interpreted by the Sixth Circuit to authorize summary affirmance of district court judgments on the court's own motion "when it is apparent from the record that the appeal is not within the jurisdiction of the court or that it is manifest that the questions on which decision of the court depends are so unsubstantial as not to need further argument . . . ." In this case the court has employed the Rule to dispense with the necessity of briefs and argument.

The basis for the District Court's holding with respect to Petitioner's § 1983 claim was that "[t]he right Plaintiff asserts," which the Court characterizes (in a phrase drawn from one of Petitioner's memoranda) as a "right to acquire, possess and enjoy its property free from official caprice,"

> does not fall within any . . . constitutionally protected categories. Rather, the Complaint alleges an action for tortious interference with contract. See *Reichman* v. *Drake*, 89 Ohio App. 222, 227-229 (Hamilton Cty. Ct. App. 1951). It does not allege a claim for relief under the constitution or laws of the United States.

In other words, because Ohio law affords a remedy for intentional interference with contractual relations, a complaint which alleges the elements of such a tort does not state a claim for violation of any federal right. However, as many recent decisions of this Court make plair, rights in property are civil rights which, though they may be and usually are creatures of state law, are protected by the Due Process Clause of the Fourteenth Amendment. *E.g.*, *Lynch* v. *Household Finance Co.*, 405 U.S. 538 (1972). The Court has also made it abundantly plain that the mere fact that a person acquires and holds interests in property by virtue of state statutory or common law does not remove his rights from the protection of the Fourteenth Amendment's restraints on the exercise of state power. In *Board of Regents* v. *Roth*, 408 U.S. 564, 576, 577 (1972), the Court observed that:

> The Fourteenth Amendment's procedural protection of property is a safeguard of the security of interests that a person has already acquired in specific benefits. These interests—property interests—may take many forms.
>
> • • • • •
>
> Property interests, of course, are not created by the Constitution. Rather, they are created and their di-

> mensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

The Court expanded on this principle in *Goss* v. *Lopez*, 419 U.S. 565, 572-73, 573-74 (1975), rejecting the argument that a public school student's right to an education at public expense, because conferred by state law, is non-federal and therefore cannot support a claim under 42 U.S.C. § 1983:

> At the outset, appellants contend that because there is no constitutional right to an education at public expense, the Due Process Clause does not protect against expulsions from the public school system. This position misconceives the nature of the issue and is refuted by prior decisions. The Fourteenth Amendment forbids the State to deprive any person of life, liberty, or property without due process of law. Protected interests in property are normally "not created by the Constitution. Rather, they are created and their dimensions are defined" by an independent source such as state statutes or rules entitling the citizen to certain benefits. *Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972).
>
> * * * * *
>
> Here, on the basis of state law, appellees plainly had legitimate claims of entitlement to a public education. . . . Having chosen to extend the right to an education to people of appellees' class generally, Ohio may not withdraw that right on grounds of misconduct, absent fundamentally fair procedures to determine whether the misconduct has occurred.

Reference to but a few decisions of this Court suffices to indicate the breadth of the Due Process Clause's protection and the variety of property interests within its scope:

Arnett v. *Kennedy*, 416 U.S. 134, 164 (Powell, J., concurring), 171 (White, J., dissenting) (1974) (nonprobationary employee in the federal competitive civil service); *Goldberg* v. *Kelly*, 397 U.S. 254 (1970) (welfare recipient's statutory right to benefits); *Connell* v. *Higginbotham*, 403 U.S. 207 (1971), and *Perry* v. *Sindermann*, 408 U.S. 593 (1972) (non-tenured public employees' interest in continued employment based on de facto tenure policy or implied promise of reemployment); *Bell* v. *Burson*, 402 U.S. 535 (1971) (motorist's interest in a driver's license).

These decisions leave no room for doubt that Petitioner's rights under its contracts, which by any fair construction were terminable during their term only for cause, were substantial property rights and that Petitioner was entitled to the protection afforded by the Due Process Clause before being deprived of them.

2. The Decisions Below Directly Conflict with This Court's Decisions in *Sterling* v. *Constantin* and *Scheuer* v. *Rhodes* by Sanctioning Executive Usurpation of Judicial Functions and by Withholding from Federal Judicial Scrutiny Charges of Bad Faith Executive Action in Violation of Constitutionally Protected Property Interests.

The District Court in this case offers at once both to distinguish *Sterling* v. *Constantin*, 287 U.S. 378 (1932), on the ground that it "rests upon a preference for due judicial procedures over the unilateral executive imposition of martial law," and to undermine its authority [15] by suggesting that it rests at least in part on the "concept of economic substantive due process." This suggestion is in

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[15] This, despite recent reaffirmation of the case by this Court in *Scheuer* v. *Rhodes*, 416 U.S. 232, 248-49 and by the Sixth Circuit in *Morgan* v. *Rhodes*, 456 F.2d 608, 610, 612-13 (6th Cir. 1972), reversed on other grounds *sub nom. Gilligan* v. *Morgan*, 413 U.S. 1 (1973).

error. Even a cursory examination of the *Sterling* opinion reveals that it is not tied to the imposition of "martial law" as distinguished from other forms of the exertion of executive power; that it is a four-square adjudication of the plaintiffs' constitutional right; and that it has nothing whatever to do with the concept of "economic substantive due process." *Sterling* is good law and directly in point.

In *Sterling* the governor of Texas had taken it upon himself to declare that a state of insurrection existed in certain Texas counties where petroleum producers were operating their wells in excess of quotas set by the state railroad commission pursuant to then recently enacted conservation legislation. The producers had obtained a preliminary court order restraining enforcement of commission quotas on the ground that they were arbitrary and in violation of the statute. Governor Sterling's executive order commanded the adjutant general of the state militia to enforce the commission quotas despite the court order, and the producers amended their bill to make the governor and others parties. A three-judge court invalidated the executive order, and the Supreme Court affirmed:

> The existence and nature of the complainants' rights are not open to question. Their ownership of the oil properties is undisputed. Their right to the enjoyment and use of these properties subject to reasonable regulation by the State in the exercise of its power to prevent unnecessary loss, destruction and waste, is protected by the due process clause of the Fourteenth Amendment. 287 U.S. at 396 (citations omitted).

Affirming the District Court's finding that "there was no military necessity which, from any point of view, could be taken to justify the action of the Governor in attempting to limit complainants' oil production, otherwise lawful," 287 U.S. at 403-04, the Court held that the plaintiffs' due process rights were violated when the Governor, "[i]n the

place of judicial procedure, available in the courts which were open and functioning, . . . set up his executive commands which brooked neither delay nor appeal." 287 U.S. at 402. The due process violation is made out by the fact that,

> Instead of affording them protection in the lawful exercise of their rights as determined by the courts, he sought, by his executive orders, to make that exercise impossible. *Id.*

The Amended Complaint in this case directly places in issue the Respondents' good faith. It charges not only that there was no basis in fact to support a belief that emergency measures were called for but also that the absence of any such necessity was well known to Respondents. In both its procedural posture and its theory this case is very like *Scheuer* v. *Rhodes*, 416 U.S. 232 (1974), and ought to be controlled by this Court's decision there. Where state power is exercised by executive officials to the injury of private right secured by the federal constitution, allegations of bad faith against the officials require the court in an action under 42 U.S.C. § 1983 to afford plaintiffs an opportunity to adduce proof in support of their claim:

> The documents properly before the District Court at this early pleading stage specifically placed in issue whether the Governor and his subordinate officers were acting within the scope of their duties under the Constitution and laws of Ohio; whether they acted within the range of discretion permitted the holders of such office under Ohio law and whether they acted in good faith both in proclaiming an emergency and as to the actions taken to cope with the emergency so declared. Similarly, the complaints place directly in issue whether the lesser officers and enlisted personnel of the Guard acted in goodfaith obedience to the orders of their superiors. Further proceedings, either by way of summary judgment or by trial on the merits, are re-

quired. The complaining parties are entitled to be heard more fully than is possible on a motion to dismiss a complaint. 416 U.S. at 249-50.

The inescapable logic of the Sixth Circuit's holding that this case is "basically a suit for breach of contract and defamation" within the "exclusive" jurisdiction of the state courts is that *Scheuer* was improperly litigated in the federal courts, that the Supreme Court's careful examination of the scope of the common law doctrine of qualified executive immunity was undertaken without jurisdiction, and that the proper result should have been to dismiss the suits as "basically" trespass or wrongful death actions over which the Ohio state courts had exclusive jurisdiction.

Involved in *Scheuer* and *Sterling* were important questions of federalism and of the separation of executive and judicial powers in a Fourteenth Amendment context. The principle that executive action cannot be "taken as conclusive proof of its own necessity," 287 U.S. at 402, is fundamental to constitutional government. But it is as effectively subverted by a conclusory characterization of Petitioner's complaint in this case as an action for breach of contract [16] as by any doctrine of absolute executive immunity. *Scheuer* and *Sterling* can be overruled. They cannot

[16] As Petitioner pointed out to the Court of Appeals in its petition for rehearing, Ohio Inns' claim against Respondents Nye and Gilligan is not for breach of contract, either "basically" or at all. Ohio Inns does not now have, nor has it ever had, any contractual relationship with Respondents Nye and Gilligan. It is true that Ohio Inns sought in its Complaint to recoup its losses by recovery against the Department of Natural Resources on a pendent claim based on the theory that the actions of the individual Respondents caused a breach of the Department's obligations under its contract with Petitioner. This claim, together with Petitioner's claim against Respondent Nye for defamation, was dismissed on the basis of the District Court's ruling concerning "the insubstantial nature of the federal claim." Since that action by the District Court was expressly stated to be an exercise of discretion, Petitioner assumes that the exercise of pendent jurisdiction would be an open question on remand.

be explained away. The best proof of that is the fact that the lower courts in this case have not even tried.

3. The Decisions of the Lower Courts are in Conflict with this Court's Decision in *Monroe* v. *Pape* and the Case Should be Remanded to the Court of Appeals for Plenary Consideration.

The lower courts' decisions fail to accord full significance to *Monroe* v. *Pape*, 365 U.S. 167 (1961). If permitted to stand, they leave in doubt the continued vitality in the Sixth Circuit of *Monroe's* teachings that 42 U.S.C. § 1983 was intended by Congress "to provide a federal remedy where the state remedy, though adequate in theory, was not available in practice," 365 U.S. at 174, that the Congress "meant to give a remedy to parties deprived of constitutional rights, privileges and immunities by an official's abuse of his position," *id.* at 172, and that "[i]t is no answer" to a complaint under the statute "that the State has a law which if enforced would give relief," *id.* at 183.

In the years since *Monroe* was decided the volume of litigation under the nineteenth century civil rights legislation has increased dramatically. So many cases have been decided by the federal courts without reference to state common, statutory, or organic law that two members of this Court only last term concurred in the opinion of a third who was prompted to observe that he regarded it as "a novel doctrine that state law is in any way relevant." *Paul* v. *Davis*, 424 U.S. 693, 715 (1976) (Brennan, J., dissenting). The Sixth Circuit in this case, as casually as if *Monroe* had never been decided, has seized upon the circumstance that the property interest involved is one Petitioner enjoyed by virtue of a contract, pointed out that there are remedies under the common law of the states for breaches of contract and defamation, and concluded that that entirely disposed of the matter. But the identification of a state remedy does not dispense with the necessity of inquiring whether a federal right has been violated.

The anomoly of the Sixth Circuit's decision is quickly demonstrated: A public school student has such a property interest in his right to an education at public expense that he may not be suspended from school for misconduct for as much as one day without notice of the charges against him, an explanation of the evidence on which the charges are based, and an adversary hearing at which he may contest the charges if he denies them. *Goss* v. *Lopez*, 419 U.S. 565 (1975). A debtor has such a property interest in the uninterrupted possession of a chattel acquired by him under a conditional sales contract, and for which he may not have made a single payment, that a private creditor, acting in the most complete good faith under state law, may not take the chattel from him even temporarily without affording him notice and an opportunity to be heard, *Fuentes* v. *Shevin*, 407 U.S. 67 (1972), *Mitchell* v. *W. T. Grant Co.*, 416 U.S. 600 (1974). For the same reason the creditor may not garnish his debtor's bank account without a hearing, *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.*, 419 U.S. 601 (1975), *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337 (1969), *Lynch* v. *Household Finance Co.*, 405 U.S. 538 (1972). And a nontenured public employee who can show a "de facto" tenure policy arising from "rules" or "understandings" has such a property interest in continued employment that he is entitled to a hearing to challenge the grounds for his non-retention before he can be discharged, *Perry* v. *Sindermann*, 408 U.S. 593 (1972). But a public contractor, who holds rights under a contract specifically authorized by state law, terminable only for cause, in reality enjoys his property, as far as the federal Constitution is concerned, at the whim of state executive officials. So far as the Due Process Clause protects him, such a contractor cannot be heard to complain if executive officials choose to render his rights illusory by suspending them without notice or hearing, even if the contractor is prepared to prove that the officals acted in bad faith, without any legitimate basis in fact for the

declaration of public necessity which they invoke in support of their action, and out of a malicious motivation. And the reason? The contractor has a contract to sue on.[18]

Petitioner believes that this case, at least at this stage of the litigation, is controlled by settled law. It is unnecessary and undesirable for this Court to accept this case at this juncture, on this record, for briefs and argument. Petitioner and this Court are entitled to a plenary consideration of the issues in this case by the Court of Appeals, and to an opinion reflecting that consideration.

The necessity for this Petition in all likelihood would have been avoided but for the Sixth Circuit's invocation of summary rules, rules which the Sixth Circuit itself has declared it its policy and practice to apply "with the strictest care." [19] It is inconceivable to us that that standard can be considered met in this case. Petitioner is convinced that justice will be served by an order remanding this case to the Sixth Circuit with instructions to give the appeal plenary consideration.

CONCLUSION

This Court's decisions over the last decade and a half have broadly expanded the procedural protections afforded

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[18] It must be noted that the Sixth Circuit, in observing that actions for breach of contract are within the "exclusive jurisdiction" of state courts, does not undertake inquiry concerning the extent to which Petitioner's state remedies might be circumscribed by Ohio doctrines of sovereign and executive immunity. In Ohio sovereign immunity was generally and strictly enforced against agencies such as the Department of Natural Resources until January 1, 1975, the effective date of Ohio's Court of Claims Act, Ohio Rev. Code § 2743.01 et seq. See, for example, *Thacker* v. *Board of Trustees*, 31 Ohio App. 2d 17, 285 N.E.2d 380 (1971); *Raudabaugh* v. *State*, 96 Ohio St. 513, 118 N.E. 102 (1917). Compare the discussion of this point in *Paul* v. *Davis*, 424 U.S. 693, at 696-697, and 715 (Brennan, J., dissenting).

[19] *Practitioners' Handbook for Appeals to the United States Court of Appeals for the Sixth Circuit* (1975), at 34. Indeed, even when the rules are invoked on motion of opposing parties, "if there is the slightest doubt, the motion to dismiss or affirm is overruled and the case is assigned for oral argument." *Id.*

private property interests. Previous distinctions under the Due Process Clause between rights and "privileges" have been thoroughly discredited. The focus has been on concepts of "expectancy," "notice" and "hearing." These developments do not alter Petitioner's constitutional right under the Fourteenth Amendment to resort to the courts to have the validity of its contract rights judicially determined. That right was violated by the Respondents' actions in this case. Their duty was to use their executive power to aid the courts in the exercise of their jurisdiction "and not to attempt to override it; to aid in making its process effective and not to nullify it, to remove, and not to create, obstructions to the exercise by [Petitioner] of [its] rights as judicially declared." *Sterling* v. *Constantin*, *supra*, at 404.

Petitioner has attempted to show the setting of this case and the critical issues involved. The Court of Appeals has not dealt with those issues. Petitioner respectfully submits that this case lends itself to summary disposition by this Court. Petitioner believes that the judgment of the Court of Appeals should be vacated and the case be remanded to the Court of Appeals for a full hearing on the merits of Petitioner's appeal to that Court.

For the foregoing reasons Petitioner respectfully prays that the writ of certiorari be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

No. 76-1636

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

OHIO INNS, INC.,
Plaintiff-Appellant,
v.
WILLIAM B. NYE, Director of the Department of Natural Resources of the State of Ohio, et al.,
Defendants-Appellees.

APPEAL from the United States District Court for the Southern District of Ohio.

Decided and Filed October 6, 1976.

Before PHILLIPS, Chief Judge, and PECK and LIVELY, Circuit Judges.

PER CURIAM. Ohio Inns filed this action on January 10, 1975, against William B. Nye, at that time Director of Natural Resources for the State of Ohio, John J. Gilligan, then Governor of Ohio, and the Department of Natural Resources of the State of Ohio, seeking damages for an alleged conspiracy under color of Ohio law to deprive Ohio Inns of rights enjoyed by virtue of a contract with the Department for the operation and management of lodging, restaurant and recreation at certain Ohio State parks.

The action is basically a suit for breach of contract and defamation, matters which are within the jurisdiction of the State Courts of Ohio. Instead of filing suit in the State courts, Ohio Inns undertook to make a federal case out of a State action by asserting jurisdiction under 42 U.S.C. §§ 1983 and 1985(3).

Appendix A

District Judge Joseph P. Kinneary dismissed the action in an opinion which is made an appendix hereto. Ohio Inns appeals.

The appeal was dismissed by an order of this court entered July 15, 1976, on the ground that the notice of appeal was filed more than 30 days after entry of final judgment. Involved in the computation of time was the question of whether appellant filed a timely motion to alter or amend the final judgment pursuant to Fed. R. Civ. P. 59(e). A Rule 59 (e) motion is timely if filed not later than ten days after final judgment. Under Rule 6(a) the last day of the period to be computed must be included, unless the last day is a Saturday, Sunday or legal holiday.

In the present case the last day for filing the Rule 59(e) motion fell on January 19, 1976, the third Monday in January which is a State legal holiday, known as Martin Luther King day, under Ohio law. Page's Ohio Revised Code § 1.14 (1975 Supp.). Therefore, Martin Luther King day is excluded in computing time in the present case. Appellant's attorney served the Rule 59(e) motion on the following day. The motion, therefore, was timely filed and the order of this court dismissing the appeal was incorrect.

Appellant has field a timely motion for reconsideration. This motion is granted and the appeal is reinstated.

The appeal now is considered pursuant to Sirth Circuit Rule 3(e).[1]

We conclude that Judge Kinneary was correct in dismissing the action for lack of jurisdiction for the reasons stated in his opinion. This case involves yet another effort to make a federal question out of litigation where exclusive

[1] *(e) Docket Control.* In the interest of docket control, the chief judge may from time to time, in his discretion, appoint a panel or panels to review pending cases for appropriate assignment or disposition under Rules 7(e), 8 or 9 or any other rule of this court.

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jurisdiction is in the State courts. *Compare Graves* v. *Sneed*, —— F.2d —— (6th Cir. No. 75-1746), ——, 1976.

We further conclude that it is manifest that the questions on which the decision of this appeal depends are so unsubstantial as not to need further argument. Sixth Circuit Rule 8.

Affirmed.

APPENDIX

OPINION AND ORDER

(Filed January 7, 1976)

Plaintiff seeks to recover damages from defendants for the deprivation of constitutional rights, tortious interference with contract, and defamation.

This matter is before the Court on the motions of defendants Nye and Gilligan to dismiss the amended complaint for failure to state a claim for relief and defendant, Department of Natural Resources of the State of Ohio, to dismiss on the grounds that it is immune from suit and that it is not a "person" within the meaning of 42 U.S.C. § 1983.

The facts as alleged in the complaint are taken as true when ruling on a motion to dismiss. The amended complaint alleges three causes of action arising out of one series of connected events.

The first cause of action is the source of federal jurisdiction. The second and third causes of action allege claims for relief under Ohio law. The Court will first consider whether the complaint pleads a federal cause of action. Then the Court will determine whether it should exercise pendant jurisdiction over the state law claims. *Gibbs* v. *United Mine Workers*, 383 U.S. 715, 725 (1966).

Appendix A

Plaintiff asserts that the first cause of action alleges claims for relief under 42 U.S.C. §§ 1983, 1985(3). Defendants argue that the facts pleaded do not state a cause of action under either § 1983 and § 1985(3). These claims for relief will be discussed separately; first the § 1985(3) claim, then the § 1983 claim.

Facts Alleged in the Amended Complaint Supporting the §§ 1983 and 1985(3) Claims.

At times relevant to the causes of action pleaded plaintiff Ohio Inns, Inc. [hereinafter Inns] had a contract with defendant Department of Natural Resources of the State of Ohio [hereinafter Department] to manage and operate lodging, restaurant and recreation facilities at Burr Oak and Salt Fork State Parks. In March, 1973 Local 505 of the Hotel, Motel, Restaurant Employees and Bartenders International Union [hereinafter Local 505] demanded that Inns recognize it as the exclusive bargaining agent for certain persons allegedly employed by it at Burr Oak. Local 505 called a strike among Inn's alleged employees in May, 1973 while a representation petition proceeding was pending before the National Labor Relations Board. On May 4, 1973 the Court of Common Pleas of Morgan County, Ohio issued a temporary restraining order against Local 505, its officers and representatives. The Common Pleas Court issued a preliminary injunction on May 15, 1973 enjoining the same parties from engaging in mass picketing, acts of violence, property destruction, intimidation and threats of bodily harm to others in connection with any strike activities, and limiting the number of pickets at Burr Oak.

The complaint further alleges that defendant William B. Nye, Director of the Department of Natural Resources of the State of Ohio, defendant John J. Gilligan, Governor of the State of Ohio, and defendant Department conspired

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"in furtherance of objectives personal to themselves and to their political interests" to deprive Inns of its contractual right to manage and operate the lodgings, restaurant and recreational facilities at Burr Oak. Defendants failed and refused to supply adequate law enforcement and protection to Inns and to those seeking to use the public facilities at Burr Oak. Before the NLRB rendered its decision, defendant Nye wrote Inns on May 30, 1973 notifying Inns that it was subject to to the National Labor Relations Act and was obligated to recognize Local 505. On June 4, 1973 Nye again write Inns stating it was in violation of the National Labor Relations Act and that the violation of that Act was a breach of Inn's contract with defendant Department. Nye further notified Inns that its contract with defendant Department might be terminated. Nye publicized his letter to Inns. Nye's objective was to force Inns to deal with Local 505.[1]

During early 1973 and thereafter Local 651 of the Hotel, Motel, Restaurant Employees and Bartenders International Union [hereinafter Local 651] attempted to organize Inn's Salf Fork employees. On May 31, 1973 Nye announced publicly and later notified Inns that it was "in default in vague, general and unspecified ways" under its contract with defendant Department for the management and operation of the lodging, restaurant and recreation facilities at Salt Fork. Nye also notified Inns that its Salt Fork contract would be terminated and Inns would be legally liable to the Department for all loss, expenses and damages suffered by the Department.

On June 6, 1973 Nye and other representatives of the Department met with representatives of Inns to discuss the threatened termination of the Salt Fork contract. Nye, who acknowledged he was acting out of "political considerations

[1] Nye's purpose was also to force Inns to deal with Local 651 as will hereinafter be set forth.

and pressure," demanded that Inns recognize and bargain with Local 505.

Throughout June, 1973 Nye and other representatives of the Department engaged in a course of conduct designed to force Inns to recognize and bargain with Locals 505 and 651. On July 10, 1973 Inns filed an action in the Court of Common Pleas for Guernsey County, Ohio seeking adjudication that defendants' charges of its default under the contracts were unfounded. The Common Pleas Court issued a temporary restraining order on July 11 and a preliminary injunction on July 23 enjoining Nye and the Department from taking any action to terminate Inn's contracts, from acting separately or in combination or in contract with any other person for the purpose of interfering with or harassing Inns in its management and operation of the facilities, and from actively soliciting persons not to patronize the facilities.

On August 3, 1973 Nye and the Department "procured from defendant Gilligan with his full knowledge and consent" an executive order authorizing and directing Nye and the Department to promulgate emergency rules closing the lodge and cabins at Burr Oak to the public. On August 4, 1973 Nye and the Department caused Burr Oak to be closed to the public and to Inn's employees. Burr Oak was reopened October 26, 1973.

The amended complaint alleges that defendants' conduct "violated plaintiff's civil rights, including its right to due process of law and to equal protection of the laws. . . ."

Conduct Actionable under § 1985(3).

Section 1985(3) of Title 42, United States Code, provides in relevant part:

> If two or more persons in any State or Territory conspire or go in disguise on the highway or on the prem-

> ises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of the equal privileges and immunities under the laws. . . . [I]n any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

The statute covers private conspiracies; but it was not "intended to apply to all tortious, conspiratorial interference with the rights of others." *Griffin* v. *Breckenridge*, 403 U.S. 88, 101 (1971). For the conspiratorial conduct to be actionable "there must be some racial, or perhaps otherwise class based, invidiously discriminatory animous behind the conspirators' action." *Id.* at 102 [footnote omitted]. The Sixth Circuit Court of Appeals has held that nonracial, class based discrimination is actionable under § 1985(3). *Cameron* v. *Brock*, 473 F.2d 608, 610 (6th Cir. 1973). *See O'Neill* v. *Grayson County War Memorial Hospital*, 472 F.2d 1140, 1145 (6th Cir. 1973); *Crabtree* v. *Brennan*, 466 F.2d 480, 481 (6th Cir. 1972); *Hopkins* v. *Wasson*, 329 F.2d 67 (6th Cir.), *cert. denied* 378 U.S. 854 (1964). There is no cause of action under § 1985(3) unless it is alleged that the conspiracy invidiously discriminated against a person (or persons) because he was a member of a class.[2] *Griffin* v. *Breckenridge*, 403 U.S. at 102.

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[2] Because of the Court's holding below that the amended complaint does not allege class based discrimination, the Court need not consider whether § 1985(3) applies to any conceptual classification of persons, or only to those classes against whom discrimination is viewed is inherently suspect. *Cf. Harper* v. *Virginia Board of Elections*, 383 U.S. 663 (1966) and the cases cited in footnote 3 below.

Plaintiff argues that defendants were "motivated by animosity" and sought to harm Inns because of its status as a nonunion employer. Plaintiff also argues in its brief that defendants' "lawless acts . . . would not have been inflicted on another otherwise situated as plaintiff whose political views in that respect were more in accord with those of defendants."

The gravaman of the complaint is that defendants tortiously interferred with Inns contracts with the Department. Defendants are alleged to have been motivated by their support of Locals 505 and 651 and by unspecified political considerations. There are no facts alleged in the amended complaint which, if proven, would establish class based invidious discrimination. At most, the complaint alleges defendants, as officers of the state, unlawfully intervened in a labor dispute on behalf of Locals 550 and 651 and against Inns. As such, the unlawful acts are not class based and they are not motivated by an invidiously discriminatory animous. The Court HOLDS that the complaint fails to state a cause of action under 42 U.S.C. § 1985(3).

Conduct Actionable under § 1983.

Section 1983 of Title 42, United States Code provides in relevant part:

> Every person who, under color of any statute . . . of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured. . . .

Section 1983 does not create a remedy for every wrong committed under color of state law. Only deprivations of rights secured by the Constitution and laws of the United States are actionable. *Street* v. *Surdyka*, 492 F.2d 368, 370-371

(4th Cir. 1974); *Simmons* v. *Wetherell*, 472 F.2d 509, 511 (2d. Cir. 1973).

Plaintiff asserts a "right to acquire, possess and enjoy its property free from official caprice." Plaintiff argues that this right arises under the equal protection or the due process clause of the Fourteenth Amendment to the Constitution of the United States. Plaintiff relies principally upon *Sterling* v. *Constantin*, 287 U.S. 378 (1932).

In *Sterling* the Texas Railroad Commission entered an order limiting oil production. Affected oil producing companies sued in United States District Court alleging the order was unauthorized, arbitrary, and capricious and that it violated a federal right to the enjoyment and use of property. The district court issued a temporary restraining order. The governor, ignoring the restraining order, took action ultimately resulting in his declaring martial law and the forceful seizure of the oil fields. The United States Supreme Court held that the governor's actions deprived the oil companies of their Fourteenth Amendment due process clause right to the use and enjoyment of their properties in a lawful manner as determined by the court. The governor "[i]n the place of judicial procedure, available in the courts which were open and functioning, . . . set up his executive commands which brooked neither delay nor appeal." *Id.* at 400-402. The decision rests upon a preference for due judicial procedures over the unilateral executive imposition of martial law. *See also*, *Wilson & Co.* v. *Freeman*, 179 F.Supp. 520 (D. Minn. 1959). To the extent the decision in *Sterling* may have rested on the concept of economic substantive due process, *Id.* at 496-397 [sic], it is no longer good authority. *See Ferguson* v. *Skrupa*, 372 U.S. 726, 729-730 (1963); *Lincoln Federal Labor Union* v. *Northwestern Iron & Metal Co.*, 335 U.S. 525, 535 (1949); *West Coast Hotel Co.* v. *Parrish*, 300 U.S. 379 (1937). To-

day the due process clause guarantees only the right to notice and to be heard before the state deprives a person of his property. *See e.g., Goss* v. *Lopez*, 419 U.S. 565 (1975); *Vlandis* v. *Kline*, 412 U.S. 441 (1973); *Bell* v. *Burson*, 402 U.S. 535 (1971); *Goldberg* v. *Kelly*, 397 U.S. 254 (1970); *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337 (1969); *Schlower* v. *Board of Education*, 350 U.S. 551 (1956). Property interests are also protected by the equal protection clause to the extent that legislative classifications cannot adversely affect the property interests of a class unless the classification is rationally related to a legitimate legisaltive goal. *See e.g., United State* v. *Moreno*, 413 U.S. 528 (1973); *Weber* v. *Aetna Casualty & Surety Co.*, 406 U.S. 164, 172-173 (1972); *Dandridge* v. *Williams*, 397 U.S. 471, 485 (1970); *Williamson* v. *Lee Optical Co.*, 348 U.S. 483 (1955).[3] Additionally, real property may not be taken by governmental action without just compensation. *Foster* v. *City of Detroit*, 405 F.2d 138 (6th Cir. 1968). *See* Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165 (April, 1967).

The right plaintiff asserts does not fall within any of these constitutionally protected categories. Rather, the complaint alleges an action for tortious interference with contract. *See Reichman* v. *Drake*, 89 Ohio App. 222, 227-229 (Hamilton Cty. Ct. App. 1951). It does not allege a claim for relief under the Constitution or laws of the United States. *See Simmon* v. *Wetherell*, 472 F.2d supra at 511. The Court HOLDS that the complaint fails to state a cause of action under 42 U.S.C. § 1983.

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[3] Where the right denied is expressly or implicitly guaranteed by the Constitution the discrimination must be supported by a compelling state interest. *See e.g., Dunn* v. *Blumstein*, 405 U.S. 330, 342-343 (1972); *Shapiro* v. *Thompson*, 394 U.S. 618, 634, 638 (1969); *Harper* v. *Virginia Board of Elections*, 383 U.S. 663 (1966).

Second and Third Counts of the Amended Complaint.

The second count of the amended complaint realleges a state law claim for tortious interference with contract. The third count of the amended complaint alleges defamation. Plaintiff argues that the Court should exercise pendant jurisdiction over these claims. *See United Mine Workers* v. *Gibbs*, 383 U.S. 715 (1966). It is within the Court's discretion whether it will exercise pendent jurisdiction. *Id.* at 726. Considering the insubstantial nature of the federal claim, the Court declines to exercise pendent jurisdiction over the state law claims.

State Agencys Immunity.

This action seeks money damages. A state is immune from suits brought in federal court by its own citizens "seeking to impose a liability which must be paid from public funds." *Edelman* v. *Jordan*, 415 U.S. 651, 663 (1974). The state may waive its immunity, but waiver will not be lightly inferred. There must be "a clear declaration of the state's intention to submit its fiscal problems to other courts than those of its own creation" before waiver may be found. *Great Northern Life Insurance Co.* v. *Read*, 332 U.S. 47, 54 (1944).

Plaintiff argues that the Ohio Court of Claims Act, § 2743.02(A), Ohio Revised Code, is a waiver of sovereign immunity as to federal court actions:

> The State hereby waives its immunity from liability and consents to be sued, and have its liability determined, in the court of claims created in this chapter in accordance with the same rules of law applicable to suits between private parties, subject to the limitations set forth in this chapter. To the extent that the State has previously consented to be sued, this chapter has no applicability.

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The Court of Claims Act limits Ohio's waiver of immunity to claims determined in the Court of Claims. There is no waiver with respect to actions pending in federal or other state courts.

Accordingly, the Court HOLDS that the Department is immune from suit.

State Is Not a "Person" within the Meaning of 42 U.S.C., § 1983.

Although it is undisputed that municipalities and other political subdivisions of the state are not "persons" within the meaning of 42 U.S.C. § 1983, *Moor* v. *County of Alameda*, 411 U.S. 693 (1973); *Monroe* v. *Pape*, 365 U.S. 167 (1961); it is arguably an open question whether a state agency is a "person" within the meaning of § 1983. *Cf. Deane Hill Country Club* v. *Knoxville*, 379 F.2d 321 (6th Cir. 1967). Because the Court has held that the complaint fails to state a cause of action under § 1983 and that the Department is immune from suit, it is not necessary to decide whether the Department is a "person" within the meaning of § 1983.

WHEREUPON, the Court HOLDS that the motions of defendants Nye, Gilligan and the Department of Natural Resources of the State of Ohio are meritorious, and therefore they are GRANTED.

This action is hereby DISMISSED.

/s/ JOSEPH P. KINNEARY
United States District Judge

Appendix B

APPENDIX B

TEXT OF PERTINENT STATUTORY AND CONSTITUTIONAL PROVISIONS

Text of Statutes

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1985(3)

If two or more persons in any State or Territory conspire or go in disquise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an election for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this sec-

tion, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

§ 1501.09 Leasing public service facilities.

The public service facilities mentioned in section 1501.07 of the Revised Code may be leased by the department of natural resources for the operation thereof as provided in section 1501.10 of the Revised Code, or may be operated by any person, firm, partnership, association, or corporation under contract with the director of natural resources as provided in section 1501.091 [1501.09.1] of the Revised Code, or may be operated by the department through the division of parks and recreation.

§ 1501.091 Contracts for operation of public service facilities.

Contracts for the operation of public service facilities shall be made in writing by the director of natural resources with the person, firm, partnership, association, or corporation whose bid, in consideration of the public interest, is determined by the director to be the best bid received, after advertisement for bids has been published for four consecutive weeks in a newspaper having a general circulation in each county in which the facility is situated. Such notice for bids shall set forth the pertinent facts concerning the facility, the periods of required operation during the year, and shall refer to the conditions of operation and

the terms of the contract which shall be on file in the office of the director and open to public inspection. Contracts for the operation of public service facilities shall contain provisions assuring that the facilities will be open to the public at reasonable rates and without discrimination as to race, creed or color, and such other provisions as the director deems necessary to satisfy the needs of the people of the state for public park facilities.

U.S. CONST. AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX C

AMENDED COMPLAINT AND JURY DEMAND

(Filed February 3, 1975)

FIRST CAUSE OF ACTION

Comes now plaintiff and for its First Cause of Action against the defendants states as follows:

1. Plaintiff is an Ohio corporation engaged in the business of operating lodging, restaurant and recreation facilities.

2. Defendant William B. Nye has been and at all material times was the Director of defendant Department of Natural Resources of the State of Ohio.

3. Defendant John J. Gilligan has been and at all material times was Governor of the State of Ohio.

4. Defendant Department of Natural Resources of the State of Ohio ("Department") is a department of the executive branch of the government of the State of Ohio charged by law with the duty, among others, of maintaining and operating the Ohio state park system, including Salt Fork State Park in Guernsey County, Ohio; Burr Oak State Park in Morgan County, Ohio; Hueston Woods State Park in Preble and Butler Counties, Ohio; and Punderson State Park in Geauga County, Ohio.

5. This cause of action arises under 42 U.S.C. § 1983 and 42 U.S.C. § 1985, and the Court has jurisdiction thereof under 28 U.S.C. § 1343 and 28 U.S.C. § 1331.

6. On or about January 31, 1966, plaintiff and defendant Department entered into a contract whereby plaintiff agreed to undertake to manage and to operate the lodging, restaurant and recreation facilities at Burr Oak State Park, at Hueston Woods State Park, and at Punderson State Park, each for a ten-year period. On or

about May 21, 1970, plaintiff and defendant Department entered into a contract for a ten-year period beginning May 17, 1972, whereby plaintiff agreed to undertake to manage and to operate the lodging, restaurant and recreation facilities at Salt Fork State Park. Copies of said contracts are attached hereto as Exhibits A and B [Excerpts from Exh. A (covering Burr Oak) appear *post*, at —]. In return for plaintiff's performance of its obligations under said contracts, defendant Department agreed, among other things, than plaintiff would occupy the facilities covered by each contract without further demand or hindrance by defendant Department, or by anyone claiming thereunder, in the performance of its contractual duties. At all times plaintiff has fully performed all of its obligations under each of said contracts insofar as it was permitted to perform them by defendants but at substantially increased cost and loss as hereinafter set forth.

7. On or about March 13, 1973, Hotel, Motel, Restaurant Employees and Bartenders International Union, Local 505, AFL-CIO, a labor organization hereinafter referred to as "Local Union 505," demanded that plaintiff recognize it as the exclusive bargaining agent for certain individuals allegedly employed by plaintiff at Burr Oak State Park, for the purpose of collective bargaining concerning the terms and conditions of said employees' employment. On March 15, 1973 Local Union 505 filed a Representation Petition with the National Labor Relations Board seeking a secret ballot election among said employees to determine whether or not they desired Local Union 505 to act as their exclusive collective bargaining representative. On May 4, 1973 the National Labor Relations Board conducted a representation hearing at which both plaintiff and Local Union 505 appeared and presented evidence.

8. Shortly before the representation hearing referred to in paragraph 7 above was to begin, on May 4, 1973, Local Union 505 called a strike among plaintiff's alleged employees at Burr Oak State Park in an attempt to force plaintiff against its will and without regard to the wishes of its employees to recognize and bargain with Local Union 505 as its employees' exclusive collective bargaining representative and thereby to circumvent the National Labor Relations Board proceedings scheduled to begin on that date for the purpose of determining whether plaintiff's alleged employees were covered by the National Labor Relations Act. Also on May 4, 1973 the Common Pleas Court of Morgan County, Ohio issued a temporary restraining order against Local Union 505 and certain of its officers and representatives; and on May 15, 1973 the said Morgan County Common Pleas Court issued a preliminary injunction against the same parties enjoining them from engaging in mass picketing, acts of violence, property destruction, intimidation and threats of bodily harm to others in connection with any strike activities, and limiting the number of pickets, at Burr Oak State Park.

9. At or about the time of the events described in paragraphs 7 and 8 above, defendants conspired among themselves and with others, in furtherance of objectives personal to themselves and to their political interests, to embark upon and did embark upon a course of conduct under color of Ohio law designed and intended to deprive plaintiff of its right to operate the lodging, restaurant and recreation facilities pursuant to said contracts and to deprive plaintiff of the enjoyment of rights secured to plaintiff by the Constitution of the United States, including its right to enforce said contracts through judicial

proceedings. Said course of conduct on the part of defendants consisted of the total failure and refusal to supply adequate law enforcement and protection to plaintiff and to those seeking to use the public facilities at Burr Oak State Park, in spite of repeated acts of violence there by Local Union 505 and the strikers beginning in May, 1973, and of other acts and omissions hereinafter described.

10. On May 30, 1973 defendant Nye, purporting to act for and on behalf of defendant Department but actually without any lawful authority or jurisdiction in the premises, notified plaintiff in writing that plaintiff was subject to the National Labor Relations Act and was obligated to recognize and to enter into collective bargaining negotiations with Local Union 505 notwithstanding the fact that the National Labor Relations Board, which possesses exclusive jurisdiction over such question, had not yet rendered its decision in the proceedings initiated by Local Union 505 and notwithstanding the fact that no election had been held among plaintiff's employees to determine whether they wished to have Local Union 505 represent them.

11. In the early part of 1973 and at various times since then Hotel, Motel, Restaurant Employees and Bartenders International Union, Local 651, a labor organization hereinafter referred to as "Local Union 651," sought to organize plaintiff's employees at the Lodge at Salt Fork State Park. On May 31, 1973 defendant Nye, purporting to act for and on behalf of defendant Department, announced publicly and later notified plaintiff that plaintiff was in default in vague, general and unspecified ways under its contract with defendant Department of May 21, 1970 covering the operation of the Salt Fork Lodge. At that time plaintiff was notified by defendant Director for

the first time that the said May 21, 1970 contract would be terminated if the defaults continued and that if the contract were terminated, plaintiff would be legally obligated thereunder to indemnify defendant Department against all loss, expenses and damages suffered by defendant Department for a period of up to ninety days and until a new operator of the facilities could be obtained. Defendant Nye saw to it that said notice received due publicity in Ohio newspapers even though the grounds for the alleged defaults were false and said defendant's real purpose and objective were to force plaintiff to deal with Local Union 505 with respect to plaintiff's employees at Burr Oak State Park and to deal with Local Union 651 with respect to its employees at Salt Fork State Park.

12. On June 4, 1973, continuing to act under his purported authority to determine the question, defendant Nye again notified plaintiff that it was covered by the National Labor Relations Act and that it had failed and refused to bargain with Local Union 505 as the representative of its employees at Burr Oak State Park Lodge. Defendant Nye asserted that such failure and refusal was a violation of the National Labor Relations Act and, accordingly, a violation of paragraph 25 of the contract between the parties dated January 31, 1966, wherein plaintiff agreed to comply with all applicable laws. Defendant Nye further notified plaintiff that if such failure and refusal continued for thirty days, its said contract of January 31, 1966 with defendant Department covering Burr Oak, Hueston Woods, and Punderson might be terminated. Defendant Nye saw to it that said notice received publicity in Ohio newspapers even though the grounds for the alleged defaults were false, the National Labor Relations Board and not Nye had exclusive juris-

diction to determine violations of the National Labor Relations Act, and said defendant's real purpose and objective were to force plaintiff to deal with Local Unions 505 and 651 with respect to plaintiff's employees at Burr Oak State Park and Salt Fork State Park.

13. On or about June 6, 1973 representatives of plaintiff met with defendant Nye and other representatives of defendant Department to discuss the threatened termination of the Salt Fork contract. Defendant Nye at that meeting demanded that plaintiff recognize and bargain with Local Union 505 at Burr Oak despite the unsettled question of plaintiff's obligation to do so which had been raised by Local Union 505 in the aforesaid proceeding before the National Labor Relations Board and which had not yet been resolved. Defendant Nye also acknowledged at that meeting that political considerations and pressure alone required him to make this demand.

14. Throughout the month of June, 1973, defendant Nye with other officers and agents of defendant Department persisted in their effort to force plaintiff to recognize and bargain with said Local Unions by continued threats, both oral and in writing, to terminate plaintiff's said contracts, purporting to support defendant Department's right to terminate said contracts with false, spurious and utterly unfounded charges of plaintiff's defaults thereunder, including allegations that plaintiff's food service was unsatisfactory and that plaintiff's refusal to recognize and bargain with said Local Unions was a breach of its contractual obligations to abide by all applicable laws and to perform its contracts in a lawful manner. Defendant Nye saw to it that his repeated efforts in this regard received publicity in Ohio newspapers even though, as he well knew, the said charges were false and

his said repeated efforts were motivated solely by personal and political considerations.

15. In an effort to protect itself against said arbitrary, wilful and malevolent conduct on the part of defendants, on July 10, 1973, plaintiff filed in the Common Pleas Court of Guernsey County, Ohio an action seeking that Court's adjudication that defendants' charges of plaintiff's defaults under its said contracts were unfounded and seeking injunctive relief against the threatened terminations and against further threats and harassment by defendants. The said Guernsey County Common Pleas Court issued a temporary restraining order on July 11, 1973, reviewed evidence and heard arguments on plaintiff's motion for a preliminary injunction on July 19, 1973, and on July 23, 1973, issued a preliminary injunction enjoining defendants Nye and the Department from taking any action to terminate plaintiff's contracts, from acting separately or in combination or in concert with any other person for the purpose of interfering with or harassing plaintiff in its management and operation of the facilities covered by its contracts, and from actively soliciting persons not to patronize the facilities operated by plaintiff.

16. Thereafter, on or about August 3, 1973, defendants Nye and Department, on the pretext that strike violence at Burr Oak State Park was creating a threat to public safety not susceptible to control by law enforcement procedures but, in reality, in furtherance of their said conspiracy to deprive plaintiff of its rights despite the lawful preliminary injunction of a court of competent jurisdiction entered to protect those rights, and without seeking stay of or relief from said preliminary injunction, procured from defendant Gilligan with his full knowledge and consent a purported Executive Order authorizing and directing defendants Nye

and Department to promulgate certain Emergency "Rules" ordering, *inter alia*, that, effective August 4, 1973, the lodge and adjacent cabin faciilties located at Burr Oak State Park be closed for any and all public and private use whatsoever. Said purported Executive Order of August 3, 1973 and the Emergency "Rules" adopted pursuant thereto were maintained and enforced as hereinafter described despite all defendants' actual knowledge of said lawful preliminary injunction of the Common Pleas Court of Guernsey County, Ohio.

17. On or about August 4, 1973, defendants Nye and Department, acting pursuant to the purported Executive Order and said Emergency "Rules" of the previous day and with defendant Gilligan's full knowledge and approval but without any lawful authority in the premises and in direct violation of the lawful order of the said Common Pleas Court of Guernsey County, Ohio, caused representatives of defendant Department to appear at Burr Oak State Park to order all patrons at the Park facilities and all plaintiff's alleged employees and representatives there to leave immediately under threat of arrest, and to enforce all other provisions of said Executive Order and Rules. All such persons, including all employees, agents and representatives of plaintiff, left said premises under threat of arrest and were not permitted by defendants to return until October 26, 1973.

18. The conduct of defendants herein described violated plaintiff's civil rights, including its right to due process of law and to equal protection of the laws guaranteed to plaintiff by the Fourteenth Amendment to the Constitution of the United States, to plaintiff's damage in an amount not less than Two Hundred Thirty-Five Thousand Dollars ($235,000.00).

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SECOND CAUSE OF ACTION

For its Second Cause of Action against defendants, plaintiff states as follows:

19. Plaintiff adopts and makes a part hereof all the allegations contained in paragraphs 1 through 18 of its First Cause of Action, as though fully repeated and set forth herein.

20. At all times plaintiff has performed or has stood ready to perform all of its obligations and duties under the aforesaid contracts attached hereto as Exhibits A and B. Where it has not been able to perform, plaintiff has been prevented by the callous acts of defendants which were calculated to prevent full performance by plaintiff or to make it so difficult that plaintiff would not be able to perform except at great additional cost and expense. Insofar as possible and as permitted, plaintiff has operated the aforesaid state park facilities in a manner which has brought great credit to plaintiff and to all defendants herein and to the State of Ohio.

21. In spite of plaintiff's exemplary and substantial performance of the aforesaid contracts, defendants have engaged in a wilful and malicious scheme and conspiracy to breach said contracts, to make it difficult, if not impossible, for plaintiff to perform in full, and to discredit and disparage the good name and reputation of plaintiff. Throughout the year 1973 and extending into 1974 defendants schemed and conspired to frustrate plaintiff's performance so as to create a situation in which full and faithful performance of said contracts by plaintiff was and has been at times impossible. Said scheme was contrived by defendants and others acting for and with them so that they might reap personal and political gains, not-

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withstanding the fact that the carrying out of said scheme and conspiracy operated to the great harm and detriment of plaintiff and of the taxpayers of the State of Ohio.

22. In addition to the facts and deeds undertaken in furtherance of said scheme and conspiracy as hereinabove alleged, defendants deliberately and maliciously harassed plaintiff in the following particular respects:

A) Beginning in the year 1972 defendants Nye and Department failed and refused to grant adequate rate relief and other relief to plaintiff to enable plaintiff to perform in accordance with the contracts of the parties. Such refusal was calculated to impair plaintiff's performance of its obligations under the aforesaid contracts and constituted a breach of defendant Department's contractual duties to said plaintiff and a breach of defendant Department's implied covenant of good faith in dealing with plaintiff under the aforesaid contracts and of its implied obligation not to interfere with or to make it impossible for plaintiff fully to discharge its contractual duties.

B) While striking employees and other lawless accomplices engaged in illegal activities at Burr Oak State Park during the summer of 1973 at the instigation and behest of said Local Unions and in the furtherance of said conspiracy, defendants utterly and completely failed and refused to supply adequate law enforcement assistance to maintain law and order there. Defendants' wilful failure in this regard and their refusal to supply adequate law enforcement protection for the citizens and patrons at Burr Oak encouraged further acts of violence and constituted a breach of defendants' contractual duties to plaintiff and a wrongful interference with plaintiff's performance. As a result of the well-publicized disorder at Burr Oak and the

direct efforts of defendants themselves, citizens were discouraged from patronizing the state park lodge and recreational facilities operated by plaintiff and groups of citizens, including employees and officers of the State of Ohio, were told by defendants Nye and Department, in breach of said contracts and in furtherance of said conspiracy, to hold their meetings and conventions elsewhere.

C) Instead of supplying law enforcement assistance at Burr Oak, defendants responded to the aforesaid unlawful union and employee activities in the furtherance of said conspiracy by closing down all facilities operated by plaintiff at Burr Oak. Such action, in addition to depriving plaintiff of its constitutional and contractual rights, constituted a breach of the aforesaid contracts by defendants Nye and Department and an unlawful interference by defendant Gilligan with plaintiff's performance and was the culmination of a wilful and malicious scheme and conspiracy by defendants to force plaintiff to deal with said Local Unions or to drive plaintiff out of business.

23. As a direct and proximate result of defendants' schemes and conspiracies, artifices, unlawful acts, interference, and breaches of contract, plaintiff since the year 1972 was not able to conduct its affairs faithfully and peaceably, free from harassment, molestation, obstruction, and embarrassment, and has sustained damages in an amount not less than Six Hundred Fifty-Four Thousand Dollars ($654,000.00), as will be shown upon the trial of this case.

THIRD CAUSE OF ACTION

For its Third Cause of Action against defendants, plaintiff states as follows:

24. Plaintiff adopts and makes a part hereof all the allegations contained in paragraphs 1 through 18 of its First Cause of Action and all the allegations contained in paragraphs 19 through 23 of its Second Cause of Action, as though such allegations were fully repeated and set forth herein.

25. Prior to the events alleged above, plaintiff enjoyed a high business reputation in the food and lodging industry. Plaintiff was nationally recognized as a pioneer in the operation of state park facilities by private enterprise. Its advice and assistance were sought by many states and by many business firms in the industry, and it was known and respected as an expert in the operation of high-quality restaurant and lodging facilities in the state parks and elsewhere.

26. In furtherance of defendants' scheme to drive plaintiff out of business, defendant Nye wilfully and maliciously uttered and caused to be published a series of false news items and reports throughout Ohio stating that plaintiff was not competent to conduct its business in a satisfactory fashion.

27. In a news report published in *The Cleveland Press* on June 2, 1973, defendant Nye was quoted as follows:

> "State Natural Resources Director William B. Nye has threatened to cancel a contract with Ohio Inns, Inc. because he said it has failed to provide adequate service at Salt Fork State Park Lodge in Southeastern Ohio."

28. In a news report published in the *Columbus Dispatch* on June 3, 1973, defendant Nye was quoted as follows:

> "The Ohio Department of Natural Resources has written a formal letter of complaint to Ohio Inns Inc.,

charging three defaults in the contract to furnish services at Salt Fork State Park.

"Director William Nye said the corporation has been remiss in:

- Not providing high quality food and food service.
- Allowing discourteous and incompetent employees to serve the public.
- Closing some facilities without departmental approval."

29. In a news report published in the *Akron Beacon Journal* on June 4, 1973, defendant Nye was quoted as follows:

"In a letter warning Ohio Inns officials to shape up or face replacement, William B. Nye . . . listed three complaints: Inadequate food service . . . discourteous and incompetent treatment and services from Ohio Inns. . . ."

30. Defendant's accusations of "inadequate food service" and "discourteous and incompetent treatment and services" by plaintiff, as described in paragraphs 27 through 29 above, are absolutely false and were known by him to be false. Such utterances were made and caused to be published in furtherance of the scheme to drive plaintiff out of business and for purposes of defendant Nye's personal political advancement. These and other scandalous, false and defamatory utterances seriously injured the business reputation of plaintiff.

31. As a direct and proximate result of the aforesaid false, scandalous, malicious, unprivileged and defamatory utterances by defendant Nye, plaintiff has lost business

opportunities in other states and it has been injured in its good name and reputation in the sum of at least Five Hundred Thousand Dollars ($500,000.00).

WHEREFORE, having stated its claims against defendants, plaintiff prays that it be awarded judgment for money damages against defendants to compensate it for its heavy losses and to serve as deterrents to defendants and others from again engaging in said wrongful activities in the future, as follows:

A) As to its First Cause of Action, plaintiff prays for judgment against defendants Gilligan and Nye, both individually and as Governor and as Director of defendant Department of Natural Resources respectively, and against defendant Department in an amount not less than $235,000.00 in compensatory damages, together with such punitive damages as may be found to be just and proper;

B) As to its Second Cause of Action, plaintiff prays for judgment against defendants Gilligan and Nye, both individually and as Governor and as Director of defendant Department respectively, and against defendant Department in an amount not less than $654,000.00 in compensatory damages, together with such punitive damages as may be found to be just and proper;

C) As to its Third Cause of Action, plaintiff prays for judgment against defendant Nye, individually and as Director of defendant Department, in an amount not less than $500,000.00 in compensatory damages and in an amount not less than $100,000.00 in punitive damages;

D) Plaintiff prays for its costs incurred herein, including reasonable attorneys' fees, and for such other relief as this Court may deem just and proper after it has heard the evidence at trial.

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Plaintiff hereby demands a trial by jury.

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Of Counsel:
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EXCERPTS FROM PUBLIC SERVICE CONTRACT EXHIBITED IN AMENDED COMPLAINT

Exhibit A

STATE OF OHIO
DEPARTMENT OF NATURAL RESOURCES
CONTRACT
TO OPERATE PUBLIC SERVICE FACILITIES

THIS AGREEMENT made and entered into this 31st day of JANUARY, 1966, by and between Ohio Inns Inc., hereinafter referred to as the Concessionaire, and the State

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of Ohio, Department of Natural Resources, hereinafter referred to as the Department, WITNESSETH THAT:

WHEREAS, the Department owns or had under construction certain lodges, cabins and public service facilities for the recreational use and benefit of the public in areas under the administration of the Division of Parks and Recreation, and may construct or require more of such facilities, and

WHEREAS, the Department is authorized by Section 1501.09 of the Revised Code to contract for the operation of such public service facilities, and

WHEREAS, the Director of Natural Resources has determined it to be in the public interest to contract with the Concessionaire for the purpose of assuring highly competent and economic practical management, maintenance, and operation of the said public service facilities, thus to furnish recreational opportunities to the public of the highest quality obtainable and at the least cost;

NOW THEREFORE, for the purpose of providing this service to the public, the parties agree as hereinafter set forth.

(1) PROPERTIES UNDER CONTRACT: The Concessionaire will operate for the Department the following properties and facilities which are indicated on the maps attached hereto: A 60-room vacation lodge located in *Burr Oak* State Park, Morgan County, with dining room service, meeting rooms, and swimming pool, along with 30 housekeeping cabins; The Manor House, a 33-room vacation lodge located in Punderson State Park, Geauga County, with dining room service and meeting rooms, along with 25 housekeeping cabins; a 96-room vacation lodge located in Hueston Woods State Park, Preble County, with dining

room service, meeting rooms, and swimimng pools, along with 59 housekeeping cabins. The Department will furnish equipment according to the specifications attached hereto. The properties, facilities, and equipment covered by this contract are hereinafter referred to as the "properties".

(2) TERM: The term of this contract is for a period beginning February 1, 1966, and ending ten years from said date, unless sooner terminated under the provisions hereof.

(3) SERVICE TO BE PROVIDED BY CONCESSIONAIRE: The Concessionaire will manage the properties for the Department as vacation lodge type facilities accommodating all activities in connection therewith which are customary and usual to such operations and to the various facilities connected therewith, except as herein otherwise expressly prohibited. The Concessionaire shall have the exclusive right to operate and manage all of the properties upon the terms of this contract, including sale and dispensing thereon of food, beverages, gifts, souvenirs, and any other appropriate merchandise ordinarily dealt in at recreational facilities of this type, except that alcoholic beverages of any kind or nature shall not be sold or merchandised thereon. The Concessionaire shall keep the properties open to the public at reasonable rates and without discrimination as to race, creed or color. No charge shall be made by the Concessionaire to park any vehicle on or near the properties, or to charge admission for entrance to the land or to the lobby or any other public areas. The Concessionaire shall provide high quality food and food service which in the opinion of the Department will best meet the needs of the public. All ingredients, supplies, and materials used in preparation of meals shall be of the highest grade and quality obtainable from dealers servicing the area. Food

service must at all times be sufficient to meet the reasonable demands of the public. The provisions of high quality food and food service is of the essence of this agreement; it is intended that the food and food service be not only adequate, but that it be of such quality that the dining facilities under this contract be respected as good eating places.

(4) CONTINUOUS OPERATION: The properties, upon being opened for public use, shall at all times during the term hereof be open for use and occupancy by the public to the extent that guests are available, it being the intent of the parties that all of the properties be operated on a year-round basis. Facilities may be shut down in off seasons with approval of the Director.

* * *

(14) CONCESSIONAIRE'S AUTHORITY: The Concessionaire shall, subject to the approval of the Director and all of the terms and provisions hereof, and except as herein otherwise provided, have control and discretion in the operation of the properties, including use of the premises for all customary purposes, the charges to be made for and the terms of admittance to the cabins and guest rooms, for commercial space, for privileges of entertainment and amusement, for food and beverages, except as herein otherwise limited, and the labor policies (including wage rates) and the hiring and discharge of employees and all phases of promotion and publicity, all except as otherwise herein expressly limited or provided. The Department agrees that Concessionaire, making the payments specified herein and performing and observing the agreements and conditions herein on its part to be performed and observed, may occupy the properties during the term hereof without further demands or hindrance by the Department or anyone claiming under it.

* * *

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(16) CONCESSIONAIRE'S EMPLOYEES: Concessionaire will employ only competent and orderly employees who will keep themselves neat and clean and accord courteous and competent treatment and service to all guests and patrons. Whenever the Department notifies Concessionaire or its manager of the properties that any employee is deemed by it to be incompetent, disorderly, or unsatisfactory, Concessionaire will discharge such person within twenty-four hours unless such person be in a managerial or supervisory position and provided, however, that such discharge is not in violation with any outstanding union contracts or other Ohio or Federal employment regulations, in which even such discharge shall take place and be effective within one week of the date of such notification. In the case of employment of supervisory personnel or manager, both will be subject to approval by the Director; however, Concessionaire will have thirty (30) days to replace supervisory personnel and sixty (60) days to replace the manager. Any person so discharged will not be reemployed except with the written consent of the Director. In the event the Department specifies uniforms to be worn by persons working on the properties, Concessionaire will furnish the necessary uniforms or require the employees to furnish same and will require their use in accordance with the requirements of the Department. Any uniforms so required shall be of such type as are ordinarily worn by employees doing like work in similar places of business.

* * *

(21) CONCESSIONAIRE'S DEFAULT: If the Concessionaire shall (a) default in any payment due under this agreement, or any payment becoming due from it to the Department under the terms hereof, and if such default shall continue for fifteen days after written notice from the Department to Concessionaire designating such default, or

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(b) shall fail to maintain standards of food and food service as required by this contract, or in any other manner shall fail to provide adequate service to the public, and if such default shall continue for ten days after written notice from the Department to Concessionaire designating such default, or (c) if for a period of thirty days after written notice by the Department specifying some other default or defaults, Concessionaire has not commenced diligently to correct the default or defaults so sepcified, or (d) if Concessionaire shall abandon or vacate the properties or discontinue the conduct of business thereon, or (e) if Concessionaire shall make an assignment for the benefit of creditors, or (f) if the interest of Concessionaire in this contract or any of the assets used by it in the transaction of the business conducted by it under the provisions of this agreement shall be sold upon execution or other legal process, or (g) if a petition in bankruptcy shall be filed by Concessionaire, or (h) if any involuntary petition under any of the provisions of the Bankruptcy Act if filed against the Concessionaire and such proceeding is not dismissed within ninety days thereafter, then and in any of such cases the Department may declare this contract terminated and Concessionaire shall immediately turn over all the properties to the Department the same as if the term of the contract had expired. In the event there is repeated default in maintaining standards of food or food service, sufficient to cause a decline in public respect for any dining facility under this contract, the Department may by written notice declare this contract terminated even though the immediate default may have been corrected. In case of any such termination, in addition to any arrears of payments or damages for other breaches of covenants to and including such termination, Concessionaire shall idemnify the Department against all loss, liability, expense and damage in-

curred until such time as a new operator is obtained, but not to exceed 90 days, as a result of such termination. Suit for the recovery of any such damages may be brought at any time by the Department, at its election, and the Department shall not be required to postpone suit until the date originally fixed for the expiration of the term.

* * *

(25) COMPLIANCE WITH LAWS: Concessionaire agrees that it will keep itself fully informed of all laws, ordinances, rules and regulations in any manner affecting its operation of the properties and facilities and of all orders and decrees of bodies and tribunals having jurisdiction or authority over same. Concessionaire will at all times observe and comply with, and cause its agents and employees to observe and comply with such existing and future laws, ordinances, regulations, orders and decrees, and will protect the Department against any claim or liability arising from any failure to so comply. Concessionaire will procure all permits and licenses, pay any charges, license fees, or taxes incident to the operation and give all notices necessary and incident to the lawful and proper prosecution of its operations hereunder.

The Concessionaire agrees that it will at all times carry Workmen's Compensation protection under the laws of the State of Ohio on all persons employed by it upon the properties or in connection with its operations thereon, and will pay all premiums or other charges legally assessed therefor, and that it will also comply with all minimum wage, maximum hours, and other laws, rules and regulations applicable to conditions of employment upon or in connection with the premises. The Concessionaire further agrees that it will not permit gambling or games of chance upon the premises, nor install, operate, or permit to be installed or

operated any device, or permit or conduct any activities upon the premises, which are illegal or contrary to good morals or are otherwise objectionable.

* * *

IN WITNESS WHEREOF, the parties hereto have caused this instrument to be executed on the day and year first above mentioned.

STATE OF OHIO
DEPARTMENT OF NATURAL RESOURCES

/s/ FRED E. MORR
FRED E. MORR
Director

/s/ MELVIN J. REBHOLZ
MELVIN J. REBHOLZ
Chief
Division of Parks and Recreation

OHIO INNS, INC.

By /s/ ROBERT A. HARPENAU
President

By /s/ RALPH L. RUTH
Vice-President

Signed in the presence of:

GEORGE C. EYRICH
IRENE HARRIGAN

STATE OF OHIO)
COUNTY OF HAMILTON) SS:

APPENDIX D

IN THE COURT OF COMMON PLEAS OF GUERNSEY COUNTY, OHIO

OHIO INNS, INC.
Plaintiff,
v.
WILLIAM B. NYE, Director of the Department of Natural Resources of the State of Ohio, et al.
Defendants.
No. 27957

PRELIMINARY INJUNCTION

This cause came on to be heard by the Court on plaintiff's Verified Complaint and Motion for a Preliminary Injunction, on the Affidavits of Douglas Ruth and Robert J. Townsend, and on the evidence submitted by the parties, all parties being represented and appearing before the Court; whereupon, the Court finds that defendants have been properly served in this cause and have received reasonable notice of the time of the hearing; that plaintiff is threatened with the imminent termination of its two concessionaire contracts with defendant Department of Natural Resources, one severing the management and operation of the lodging, restaurant and recreation facilities at Salt Fork State Park in Guernsey County and the other covering the management and operation of the lodging, restaurant and recreation facilities at Burr Oak State Park in Morgan County, Hueston Woods State Park in Preble County, and Punderson State Park in Geauga County; and that plaintif may suffer immediate, substantial, and irreparable injury, loss and damage in the event that either or both of the concessionaire contracts between plaintiff and defendant Department of Natural Resources are terminated; wherefore

IT IS HEREBY ORDERED that defendants be, and each of them, their officers, representatives, agents and

employees, hereby are, restrained and enjoined (a) from taking any action to terminate either or both of the concessionaire contracts entered into between plaintiff and defendant Department of Natural Resources on May 27, 1970, and effective beginning May 17, 1972, covering the lodging, restaurant and recreation facilities at Salt Fork State Park and the concessionaire contract between plaintiff and defendant Department of Natural Resources entered into on January 31, 1966, covering the management and operation of lodging, restaurant and recreation facilities at Burr Oak State Park in Morgan County, Hueston Woods State Park in Preble County, and Punderson State Park in Geauga County and (b) from acting separately or in combination or in concert with any person for the purpose of interfering with or harassing plaintiff in its management and operation of said facilities at any of said State Parks, or actively soliciting persons not to patronize the facilities at the said four State Parks.

Default letters directed to the plaintiff in accordance with the contracts between the parties will not be considered a violation of this preliminary injunction.

This preliminary injunction shall remain in full force and effect until final judgment rendered by the Court on the merits of this cause or until further order of the Court. Plaintiff shall post bond in a form satisfactory to the Clerk in the amount of $10,000.00.

It is further ordered that defendants' motion for the escrow of the profits of plaintiff during the pendency of this action be overruled. Exceptions are noted.

It is further ordered that this cause come on for trial on Wednesday, September 12, 1976, at 9:00 A.M.

/s/ MERLE HODDINOTT
MERLE HODDINOTT, *Judge*
(By assignment)

APPENDIX E

STATE OF OHIO
EXECUTIVE DEPARTMENT
OFFICE OF THE GOVERNOR
COLUMBUS, OHIO

EXECUTIVE ORDER

WHEREAS, the Governor of the State of Ohio is sworn to uphold the Constitution and the laws of this state; and

WHEREAS, the Constitution and the laws of this state place upon the Office of the Governor the responsibility for protecting and assuring the health, safety, and general welfare of the Citizens of this State and the responsibility of protecting state property; and

WHEREAS, the Constitution of this State sets forth that: "The supreme executive power of this state shall be vested in the governor."; and

WHEREAS, pursuant to these and other constitutional and statutory powers and responsibilities I have directed and ordered an investigation of the "labor-management" dispute between Ohio Inns, Inc., and its employees at the Burr Oak State Park Lodge and Cabin facilities as such dispute relates to the safe use of such facilities by the citizens of this state; and

WHEREAS, the results of this investigation convince me that said facilities and the health, safety, and general welfare of the public attempting to utilize said facilities are seriously threatened as a result of this dispute; and

WHEREAS, the results of this investigation and reports by state and local enforcement agencies convince me that additional use of state and local enforcement or military officers in this situation cannot guarantee the health, safety, and general welfare of the public and in fact will only serve to further aggravate the situation resulting in even greater danger to the public and to state property; and

WHEREAS, pursuant to these findings and conclusions I

have directed and ORDERED the Department of Natural Resources, Division of Parks and Recreation to temporarily close the lodge and cabin facilities located at Burr Oak State Park; and

WHEREAS, pursuant to my direction and Order the Department of Natural Resources, Division of Parks and Recreation has promulgated certain rules relative to the closing of said lodge and cabin facilities and pursuant to my direction and order has requested that I determine that an emergency requires the immediate adoption of Chapter NRp-25, Rule 01, 02, and 03.

NOW THEREFORE, I, JOHN J. GILLIGAN, Governor of the State of Ohio, under Authority of the Constitution and laws of this state hereby determine that an emergency exists requiring the immediate adoption of Chapter NRp-25, Rule 01, 02, and 03 of the Division of Parks and Recreation and order that the procedure prescribed by Section 119.03, Revised Code, be suspended and that the Division of Parks and Recreation make Chapter NRp-25, Rule 01, 02, and 03 effective immediately.

I FURTHER DIRECT that a copy of this Order be filed with the Secretary of State.

IN WITNESS WHEREOF, I have hereunto subscribed my name and caused the Great Seal of the State of Ohio to be affixed at Columbus, this 3rd day of August, in the year of our Lord, one thousand nine hundred and seventy-three.

/s/ JOHN E. HANSON
JOHN E. HANSON
Authorization officer for Governor John J. Gilligan

ATTEST:

_____

Secretary of State

Appendix E

EMERGENCY CHAPTER NRp-25, RULE 01

NRp-25-01 *Lodge and Cabin Closing*

It is hereby Ordered that:

Pursuant to the provisions of Emergency Chapter NRp-25, Rule 01, 02 and 03 the lodge and adjacent cabin facilities located at Burr Oak State Park and all park entrance roads leading thereto shall be closed for any and all public or private use whatsoever effective August 4, 1973, at 10:00 A.M.

This EMERGENCY RULE was promulgated in accordance with Chapters 119 and 1541, and more particularly, Section 119.03 (F), Revised Code of Ohio and hereby adopted by the State of Ohio, Department of Natural Resources, Division of Parks and Recreation, to be effective on the 4th day of August 1973, at 10:00 A.M.

EFFECTIVE AUGUST 4, 1973

EMERGENCY CHAPTER NRp-25, RULE 02

NRp-25-02 *Posting of Closed Areas*

It is hereby Ordered that:

The facilities, entrances and public access points of facilities which are closed pursuant to the provisions of NRp-25-01 shall be clearly posted and marked by signs stating that such areas and facilities are closed.

This EMERGENCY RULE was promulgated in accordance with Chapters 119 and 1541, and more particularly, Section 119.03 (F) Revised Code of Ohio and hereby adopted by the State of Ohio, Department of Natural Resources, Division of Parks and Recreation, to be effective on the 4th day of August 1973, at 10:00 A.M.

EFFECTIVE AUGUST 4, 1973

Appendix E

EMERGENCY CHAPTER NRp-25, RULE 03

NRp-25-03 *Prohibition*

It is hereby Ordered that:

No person shall enter upon or be upon for any purpose whatsoever or make any use of the facilities and entrances and public access points which have been closed pursuant to the provisions of NRp-25-01 and which have been posted and marked as such pursuant to the provisions of NRp-25-02.

This EMERGENCY RULE was promulgated in accordance with Chapters 119 and 1541, and more particularly, Section 119.03 (F), Revised Code of Ohio and hereby adopted by the State of Ohio, Department of Natural Resources, Division of Parks and Recreation, to be effective the 4th day of August, 1973 at 10:00 A.M.

EFFECTIVE AUGUST 4, 1973

It is hereby Ordered that:

The foregoing Emergency Chapter NRp-25, Rule 01, 02 and 03 was promulgated in accordance with Chapters 119, 1541, and more particularly, Section 119.03 (F), Revised Code of Ohio and hereby adopted by the State of Ohio, Department of Natural Resources, Division of Parks and Recreation to be effective on the 4th day of August, 1973 at 10:00 A.M.

/s/ J. E. MILLER
JACK MILLER
Chief
Division of Parks and Recreation

I, William B. Nye, Director, Department of Natural Resources, on this 4th day of August, 1973, hereby approve the adoption of the foregoing Emergency Chapter NRp-25,

Appendix E

Rule 01, 02 and 03 and hereby certify that the foregoing is a true copy of the Original which is on file in the Office of the Chief of the Division of Parks and Recreation, Department of Natural Resources, State of Ohio.

/s/ WILLIAM B. NYE
WILLIAM B. NYE
Director
Department of Natural Resources

APPENDIX F

IN THE COURT OF COMMON PLEAS
OF GUERNSEY COUNTY, OHIO

OHIO INNS, INC.
Plaintiff,
v.
WILLIAM B. NYE, Director, etc., et al.
Defendants.
No. 27957

JOURNAL ENTRY

This cause came on to be heard upon plaintiff's charge of contempt and the evidence, all parties and all other persons accused of contempt being represented by counsel.

Upon due consideration, the Court finds that the defendant, William B. Nye as Director of the Department of Natural Resources, as well as John J. Gilligan as Governor; Jack E. Miller as Chief, Division of Parks and Recreation; and Joseph Houston as Deputy Director of the Department of Natural Resources, but not John E. Hansan or John T. Davidson, are in civil contempt.

It is ordered that the said contemners purge themselves of contempt forthwith by rescinding the Executive Order of August 3, 1973, Rules 01, 02, and 03 of Chapter NRp-25, and the order of the Department of Natural Resources of August 4, 1973; in addition they are to do all things necessary and reasonable so that plaintiff can resume the carrying on of its business at Burr Oak State Park in accordance with its concession contract.

It is further ordered that the said contemners report to this Court by their counsel that they have complied with this order on Tuesday, August 21, 1973, at 9:30 A.M., unless counsel of the parties agree before hand that such reporting is unnecessary.

Appendix E

It is further ordered that the said contemners pay the costs of this contempt proceeding.

/s/ MERLE HODDINOTT
MERLE HODDINOTT
Judge
(By assignment)

Supreme Court, U. S.
FILED
MAR 8 1977
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1094

OHIO INNS, INC.,
Petitioner,

vs.

WILLIAM B. NYE, et al.,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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In The

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1094

OHIO INNS, INC.,

Petitioner,

vs.

WILLIAM B. NYE, et al.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

STATEMENT OF THE CASE

1. Nature of the Case

This case involves the sole question of whether the First Cause of Action of the Amended Complaint below stated a claim upon which relief can be granted. Rule 12(b)(6), Federal Rules of Civil Procedure.

2. Course of Proceeding

This action was commenced on January 10, 1975, by the filing of a Complaint by Ohio Inns, Inc., naming as Defendants William B. Nye, Director of the Ohio Department of Natural Resources, John J. Gilligan, Governor

of Ohio, and the Ohio Department of Natural Resources. An Amended Complaint was filed on February 3, 1975 (Appendix C, Petition for Writ of Certiorari). The Amended Complaint consisted of three "causes of action," the latter two of which were claims under state law submitted for adjudication under the District Court's pendent jurisdiction. Only the "First Cause of Action" purported to state a claim arising under federal law.

Ohio Inns' first cause of action rested solely upon 42 U. S. C. Sections 1983 and 1985 as sources of substantive law (memoranda of Ohio Inns later indicated that reliance upon 42 U. S. C. Section 1985 was limited to subsection (3) thereof). A lengthy recitation of facts alleged that Defendants had ordered the closing of the state facility at which Plaintiff Ohio Inns performed concession services pursuant to a contract with Defendant Ohio Department of Natural Resources. Such closing deprived Ohio Inns of revenue during the period in which the facility was closed.

Of great significance is the manner in which the first cause of action was drawn so as to attempt to invoke 42 U. S. C. Sections 1983 and 1985 (3). Paragraph 18 of the Amended Complaint recited the constitutional violations as deprivation of "due process of law and . . . equal protection of the laws guaranteed to plaintiff by the Fourteenth Amendment." However, facts elsewhere alleged in the first cause of action failed to support Ohio Inns' conclusion that its Fourteenth Amendment rights had been violated.

As to equal protection, the first cause of action lacked an allegation of the class of which Ohio Inns was a member and the discriminatory animus against such class upon which the actions of Defendants were based. Only vague innuendos appeared, such as that in Paragraph 11 ("real purpose and objective were to force plaintiff to deal with Local Union 505 . . . and to deal with Local Union 561") and Paragraph 14 ("[Defendants] were motivated solely by personal and political considerations.") The first cause of action, therefore, lacked factual allegations upon which an equal protection claim would rest.

As to violations of due process of law, the first cause of action was equally deficient. The allegations of fact asserted that Defendants had either breached Ohio Inns' concession contract, or interfered with the performance thereof, on malicious and pretextual grounds. No allegation appeared that Ohio Inns was deserving of notice or hearing procedures not afforded by the state. Rather, the Amended Complaint equated the act by state officials of breach of contract or tortious interference with contracual performance with a deprivation of due process of law. Such equation was made without any allegation that particular procedures due Ohio Inns had been ignored.

In response to motions to dismiss, the District Court, on January 7, 1976, filed an opinion and order dismissing the Amended Complaint as failing to state a claim upon which relief can be granted (Appendix A, Petition for Writ of Certiorari). As to 42 U. S. C. Section 1985(3), the Court accurately concluded that the first cause of action failed to allege a "class based, invidiously discriminatory animus" behind the Defendants' actions. As such, a cause of action had not been alleged, *Griffin v. Breckenridge*, 403 U. S. 88 (1971).

With regard to 42 U. S. C. Section 1983, the Court properly concluded that a mere allegation of an unlawful act (here, breach of contract or tortious interference with performance of a contract) by state officials did not rise to a deprivation of due process of law. Rather, the Court concluded that the Due Process Clause, as a general matter, protects property from deprivation by a state in the absence of fair procedures. Because the first cause of action failed to allege deprivation of procedures due Ohio Inns, a constitutional violation had not been alleged.

The Court addressed two further matters. Exercising its discretion, *United Mine Workers v. Gibbs,* 383 U. S. 715 (1966), the Court declined to adjudicate Ohio Inns' state law claims set forth in the second and third causes of action. Lastly, the Court held that Defendant Ohio Department of Natural Resources was immune from suit pursuant to the Eleventh Amendment, *Edelman v. Jordan,* 415 U. S. 651 (1974).

On March 4, 1976, Ohio Inns instituted an appeal in the Court of Appeals for the Sixth Circuit. In its brief on the merits, Ohio Inns challenged only the holding below regarding the adequacy of the first cause of action in stating a claim under 42 U. S. C. Sections 1983 and 1985(3). Therefore, Ohio Inns acquiesced in the dismissal of the Ohio Department of Natural Resources as immune from suit. The Court, on October 6, 1976, based upon the opinion below and the brief of Ohio Inns, affirmed on the ground "that it is manifest that the questions on which the decision of this appeal depends are so unsubstantial as not to need further argument."

Ohio Inns, on February 7, 1977, filed its Petition for Writ of Certiorari in this Court. Notably, the Petition does not simply set forth pertinent portions of the allegations of fact in the Amended Complaint but instead seeks to replead the first cause of action in the Amended Complaint through a lengthy Statement of the Case, including portions entitled "Petitioner's Concession Contracts" and "Events Underlying This Lawsuit." Such Statement goes beyond the allegations of fact in the first cause of action. Rather, solely at issue here is the legal sufficiency of the allegations of fact set forth in the first cause of action in stating a claim under 42 U. S. C. Sections 1983 and 1985(3). The Court is therefore respectfully requested to disregard all allegations of fact except those appearing in the first cause of action in the Amended Complaint (Appendix C, Petition for Certiorari).

The Petition sets forth five questions for review. Although two of the five questions cite 42 U. S. C. Section 1985(3), none challenges the holdings below that the first cause of action failed to state a claim under that section due to failure to comport with the requirements of *Griffin v. Breckenridge,* 403 U. S. 88 (1971). Nor does the Petition challenge the dismissal below of the Ohio Department of Natural Resources as immune from suit. Therefore, only the propriety of the holding with regard to 42 U. S. C. Section 1983 is presented to the Court for review.

QUESTION PRESENTED

Did the Amended Complaint state a claim for deprivation of due process of law under 42 U. S. C. Section 1983 upon which relief can be granted by alleging that state officials, upon pretextual grounds and with improper motives, breached or interfered with performance of a contract between the state and plaintiff concessionaire, where the Amended Complaint wholly failed to allege deprivation of procedures due under law.

———o———

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

1. The Sixth Circuit's Decision Appropriately Declined to Equate a Breach of Contract or Tortious Interference With Performance of a Contract by State Officials With a Deprivation of Due Process of Law.

The holding below—that a bare allegation of breach of contract or a tortious interference with performance of a contract by state officials does not state a cause of action for deprivation of due process of law—was clearly correct. Petitioner Ohio Inns cites no case which holds to the contrary. Counsel for Respondents know of no such case. Indeed, the District Court and Court of Appeals would have been bold indeed in ruling that the federal courts are empowered by 42 U. S. C. Section 1983 to address contract disputes between a state and a contractor. Surely,

that a state is a party to a contract or that a state official commits tortious interference with performance of a contract are not sufficient to render such breach or tort of interference as being of constitutional import.

Moreover, the result below comports with a recent decision of this Court, *Paul v. Davis,* 424 U. S. 693 (1976). There, the Court was most careful to indicate that 42 U. S.. C. Section 1983 does not extend to all unlawful acts of state officials merely because such act was performed by state officials. The Court stated, at 698:

> It is hard to perceive any logical stopping place to such a line of reasoning. Respondent's construction would seem almost necessarily to result in every legally cognizable injury which may have been inflicted by a state official acting under "color of law" esablishing a violation of the Fourteenth Amendment. We think it would come as a great surprise to those who drafted and shepherded the adoption of that Amendment to learn that it worked such a result, and a study of our decisions convinces us they do not support the construction urged by respondent.

And, at 701:

> [Respondent] apparently believes that the Fourteenth Amendment's Due Process Clause should *ex proprio vigore* extend to him a right to be free of injury wherever the State may be characterized as the tortfeasor. But such a reading would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States. We have noted the "constitutional shoals" that confront any attempt to derive from congressional civil rights a body of general federal tort law, *Griffin v. Breckenridge,* 403 U. S. 88, 101-102 (1971); *a fortiori* the procedural guarantees of the Due Process Clause cannot be the source for such law.

Clearly, more is needed than a mere allegation of an unlawful act by a state official to state a claim under 42 U. S. C. Section 1983 for deprivation of due process of law.

Petitioner erroneously contends—as is evidenced in the Amended Complaint dismissed below — that the Due Process Clause confers protections upon a citizen which go beyond provision of fair procedures prior to deprivation of property by a state. The Amended Complaint sought redress for the deprivation, not redress based upon an absence of procedures through which such deprivation is to be effectuated. Indeed, the cases relied upon by Petitioner address the issue of requisite procedures, and do not establish 42 U. S. C. Section 1983 as a federal remedy for tort or breach of contract, *North George Finishing, Inc. v. Di-Chem, Inc.*, 419 U. S. 601 (1975); *Goss v. Lopez*, 419 U. S. 565 (1975); *Mitchell v. W. T. Grant Co.*, 416 U. S. 600 (1974); *Perry v. Sindermann*, 408 U. S. 593 (1972); *Fuentes v. Shevin*, 407 U. S. 67 (1972); *Lynch v. Household Finance Co.*, 405 U. S. 538 (1972); *Sniadach v. Family Finance Corp.*, 395 U. S. 337 (1969).

This Court should decline to accept Petitioner's novel view of the Due Process Clause which was specifically rejected in *Paul v. Davis, supra.*

2. The Decision Below Did Not Conflict With Sterling v. Constantin and Scheuer v. Rhodes.

The case of *Sterling v. Constantin*, 287 U. S. 378 (1932), is distinguishable from the case at bar. There, the governor of Texas ignored existing administrative and judicial procedures available to achieve his goal of limiting production of oil, and marshalled military force

instead. Such a circumvention and violation of available judicial procedures were condemned by the Court, stating, at page 402, "In the place of *judicial procedure, available* in the courts which were open and functioning, he set up his executive commands which brooked neither delay nor appeal." (Emphasis added.) *Sterling*, therefore, decried the violation of established due process. The present case is quite different. No claim was made that Respondents failed to invoke existing procedures to achieve their goal. Rather, Respondents were alleged to have acted in a tortious manner and to have exceeded their lawful authority. Therefore, unlike *Sterling*, questions of procedure are simply not presented in the instant case.

Also distinguishable is *Scheuer v. Rhodes*, 416 U. S. 232 (1974). There, the complaint was not dismissed on a perceived deficiency in pleading the cause of action. Rather, the dismissal rested upon the affirmative defenses of Eleventh Amendment immunity and the common law doctrine of executive immunity. In the instant case, Respondents never claimed immunity below, but rather that the Amended Complaint was substantively deficient. *Scheuer* is therefore inapposite.

The decision below, therefore, did not conflict with *Sterling* and *Scheuer* so as to warrant issuance of a writ of certiorari.

3. The Courts Below Did Not Hold That a Right Secured by Contract is Not Protected by the Due Process Clause.

Ohio Inns misconstrues the decisions below as holding that the rights secured by Ohio Inns' contract with the state are not afforded protection by the Due Process Clause. Neither court so held, for such is clearly erroneous, *Board of Regents v. Roth*, 408 U. S. 564 (1972).

Rather the courts below held that the Amended Complaint simply did not allege facts which, if proven, would demonstrate a deprivation of due process of law. As discussed above, the Amended Complaint addressed the alleged acts of Respondents which interfered with Ohio Inns' performance of its contracts. Not a word of the Amended Complaint alleges deprivation of procedures due under law. In sum, in its effort to obtain review by this Court, Ohio Inns attempts to rely upon error which has not occurred.

4. The Courts Below Did Not Hold That Existence of a State Remedy Makes Unavailable a Federal Remedy.

In a like manner, Ohio Inns misconstrues the decisions below as holding that existence of a state remedy in breach of contract and tortious interference with contract in itself forecloses existence of a federal remedy. However, such a position, which conflicts with *Monroe v. Pape*, 365 U. S. 167 (1961), was never advocated below by Respondents, and neither court based its analysis upon such a misreading of *Monroe*. Although both courts noted existence of a state remedy, neither regarded such existence as determinative of whether a cause of action had been stated under federal law. Rather, the District Court carefully analyzed the Amended Complaint for sufficiency in the context of 42 U. S. C. Sections 1983 and 1985 (3) and determined that *nothing more* than a state claim was alleged. The Court of Appeals affirmed "for the reasons stated" in the opinion of the District Court. Therefore, neither court utilized an erroneous shortcut of identifying a concurrent state remedy to justify withholding of a federal remedy. Again, an error perceived by Ohio Inns did not occur below.

5. The Summary Affirmance by the Court of Appeals Was Proper.

Ohio Inns closes its Petition by requesting the Court to summarily remand the case to the Court of Appeals for plenary consideration. Such is unnecessary, for the issue before the Court of Appeals was of such clarity as to warrant summary affirmance. The opinion of the District Court closely analyzed the Amended Complaint, and noted the lack of allegations of class-based discriminatory animus necessary to state a cause of action under 42 U. S. C. Section 1985 (3), and the absence of allegations that requisite notice and hearing procedures were withheld from Ohio Inns so as to state a cause of action for deprivation of due process under 42 U. S. C. Section 1983. As such, the Amended Complaint was clearly faulty, and dismissal, and affirmance thereof, were clearly correct. In such circumstances, plenary consideration of Ohio Inns' erroneous arguments of law would constitute a waste of limited judicial resources, and should not be required.

In sum, the summary affirmance by the Court of Appeals does not warrant issuance of a writ of certiorari and remand for complete briefing and argument.

CONCLUSION

Petitioner Ohio Inns' theory of law upon which its case is based attempts to too broadly define the cause of action provided by 42 U. S. C. Section 1983 for deprivation of due process of law. As is apparent from the opinions below, the dismissal was entirely correct. Accordingly, a writ of certiorari should not issue.

Respectfully submitted,

WILLIAM J. BROWN
ATTORNEY GENERAL OF OHIO

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